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Supreme Court of the United States

October Term, 1998

QUALITY PROFESSIONAL NURSING, INC., CRITICAL HEALTH CARE, INC., A COMPLETE HEALTH SERVICE, INC., ALL CARE NURSING SERVICE, INC., AND THE PDQ NURSE, INC.,

Petitioners,

v.

BETHESDA MEMORIAL HOSPITAL, INC., JUPITER HOSPITAL, INC., NME HOSPITALS, INC. D/B/A DELRAY COMMUNITY HOSPITAL, JOHN F. KENNEDY MEDICAL CENTER, INC., WELLINGTON REGIONAL MEDICAL CENTER, INC., NME HOSPITALS, INC. D/B/A WEST BOCA MEDICAL CENTER, PINECREST REHABILITATION CENTER, BOCA RATON COMMUNITY HOSPITAL, INC., SOUTH FLORIDA HOSPITAL ASSOCIATION, INC., and HIGH TECH STAFFING SERVICES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER, DURING AN EXTENDED NURSING SHORTAGE CAUSING FREQUENT FREE-MARKET PRICE INCREASES FOR TEMPORARY NURSING SERVICES BEING SOLD BY AGENCIES TO HOSPITALS, *PER SE* ILLEGAL HORIZONTAL PRICE FIXING – BROADLY DEFINED BY THIS COURT TO ENCOMPASS PRICE CAPPING AND PRICE STABILIZING – RESULTED WHEN ALMOST ALL COMPETING HOSPITALS IN PALM BEACH COUNTY, FLORIDA, COMBINED (WITH YET OTHER PARTIES): (1) TO JOINTLY LIMIT THE NUMBER OF AGENCIES WITH WHICH THE HOSPITALS WOULD DO BUSINESS (ABSENT EXIGENT CIRCUMSTANCES); AND (2) TO JOINTLY FORCE EACH CHOSEN AGENCY TO AGREE NOT TO RAISE ITS PRICES FOR THE NEXT YEAR AND TO OFFER IDENTICAL PRICES TO ALL PARTICIPATING HOSPITALS?

II. WHETHER, IN ACCORDANCE WITH PRIOR DECISIONS OF THIS COURT, A COMBINATION OF COMPETING HOSPITALS (WITH YET OTHER PARTIES) – (1) TO JOINTLY LIMIT THE NUMBER OF AGENCIES WITH WHICH THE HOSPITALS WOULD DO BUSINESS (ABSENT EXIGENT CIRCUMSTANCES), AND (2) TO JOINTLY FORCE EACH CHOSEN AGENCY TO AGREE NOT TO RAISE ITS PRICES FOR THE NEXT YEAR AND TO OFFER IDENTICAL PRICES TO ALL PARTICIPATING HOSPITALS – CONSTITUTED A *PER SE* ILLEGAL GROUP BOYCOTT AGAINST EXCLUDED AGENCIES?

III. WHETHER, IN ACCORDANCE WITH PRIOR DECISIONS OF THIS COURT, A COMBINATION OF COMPETING HOSPITALS (WITH YET OTHER PARTIES) – (1) TO JOINTLY LIMIT THE NUMBER OF AGENCIES WITH WHICH THE HOSPITALS WOULD DO BUSINESS (ABSENT EXIGENT CIRCUMSTANCES), AND (2) TO JOINTLY FORCE EACH CHOSEN AGENCY TO AGREE

QUESTIONS PRESENTED – Continued

NOT TO RAISE ITS PRICES FOR THE NEXT YEAR AND TO OFFER IDENTICAL PRICES TO ALL PARTICIPATING HOSPITALS – BY ENGAGING IN A NAKED RESTRAINT ON FREE-MARKET PRICING, SHOULD BE SUMMARILY CONDEMNED AS A VIOLATION OF ANTITRUST LAW UNDER THE RULE OF REASON, WITHOUT REQUIRING A SHOWING OF MARKET POWER WITHIN A RELEVANT MARKET?

LIST OF CORPORATIONS RELATED TO CORPORATE PETITIONERS

There are no other corporations which are related to the corporations which are the petitioners herein.

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PETITION FOR WRIT OF CERTIORARI

The five Petitioners – Quality Professional Nursing Service, Inc., Critical Health Care, Inc., A Complete Health Service, Inc., All Care Nursing Service, Inc., and The PDQ Nurse, Inc. – respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals (App. 1-20) is reported at *All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc.*, 135 F.3d 740. Denials of petitions for rehearing and suggestions of rehearing *en banc* (App. 51-53, App. 54-55) are unreported. The district court's judgment (App. 21-28) and opinion denying post-trial motions (App. 29-50) are unreported.

JURISDICTION

The court of appeals affirmed judgments against petitioners in their consolidated appeal by order dated February 18, 1998, and denied petitioners' timely suggestions of rehearing *en banc* and petitions for rehearing, by unpublished orders dated May 18, 1998 (App. 51-53) and September 18, 1998 (App. 54-55). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[1]

STATEMENT OF THE CASE

This case involves a challenge to price fixing and a group boycott by several competing South Florida hospitals directed against temporary nursing agencies. The key facts that led to this action in the district court for violations of Sherman Act § 1 (thus conferring jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. §§ 4, 12 and 16) are as follows:

A. Pre-Violation: A Nursing Shortage Led To Competition And Free-Market Price Increases

In the mid-1980s, a severe nursing shortage existed in Palm Beach County, Florida, including a shortage of nurses available to staff hospitals in that county.[2] The

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[1] Suit also was brought under Florida antitrust law, which for purposes of this action is identical to federal law, except that Florida law does not require proof of impact on interstate commerce. Fla. Stat. § 542.18, analogous to Sherman Act § 1, provides: "Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." The parties have stipulated that the interstate commerce requirement has been met in this action.

[2] Typically, nurses worked either in hospitals, nursing homes, or physicians' offices. Nurses working in hospitals

shortage, which extended into the mid-1990s, mainly resulted from nurses' low compensation and unsatisfactory working conditions in hospitals, which caused many licensed nurses to drop out of the profession, and deterred new entry into the profession.

Prior to the shortage, hospitals mostly relied on staff nurses employed by hospitals. Hospitals customarily called on local temporary nursing service agencies to supply supplemental nurses during peak winter seasons, when Northern "snowbirds" swelled Florida's population, as well as to supply nurses to fill in for sick or vacationing staff nurses.

However, as the shortage continued, nurses increasingly left hospital employment to work for agencies, including petitioners, which offered higher compensation and better working conditions. By mid-1988, more than two dozen agencies in Palm Beach County were seeking to place nurses in hospitals. Fierce competition for nurse allegiance ensued among agencies and hospitals – a competition that the agencies increasingly were winning. The marketplace for nursing services was unconstrained. Each of Palm Beach County's 16 hospitals and each of the dozens of agencies was free to compete by offering nurses better compensation and conditions. There were no barriers to entry for new agencies. Likewise, the nurses, still in short supply, were free to choose among the various hospitals and agencies. Competition flourished.

("hospital nurses") generally were paid more than non-hospital nurses, worked under more demanding and stressful conditions, and were not interested in working outside a hospital setting.

The free market, and the law of supply and demand, were operating entirely properly in the face of a shortage: the competition for nurses was pushing nurse compensation up rapidly, largely due to the agencies' greater willingness to reward the nurses; and hospitals were experiencing frequent price increases from agencies – as often as three times a year. Consequently, nurses who had exited the market were returning to the practice.

Despite competition and spiraling prices, nursing compensation levels still were not high enough to reach what economists call the "equilibrium point" – i.e., the point at which supply and demand are equal, prices stabilize, and the shortage ends. (Conversely, during times of oversupply or glut, free-market prices fall, until the "equilibrium point" is reached and prices stabilize.) Because the nursing shortage persisted, free-market prices were expected to keep rising, fueled by agency competition.

The hospitals in Palm Beach County chose not to compete against one another and against the agencies for nurse allegiance. Rather, the hospitals sought to prevent or minimize further free-market price increases. But a single hospital, acting alone, found itself unable to halt the tide of rising prices, as nurses continued to flock to the agencies. The hospitals found their solution in combining their forces.[3]

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[3] The Director of Nursing for Palms West Hospital (a co-conspirator not a respondent herein) testified:

> "Q. Couldn't Palms West have entered into eight agreements with eight agencies that Palms West liked and thought were competent and had the best prices and quality that they could find without joining with ten other hospitals in Palm Beach County?

B. The Violation: Competing Hospitals Joined Together To Restrain Free-Market Prices

In mid-1988, 12 of the 16 competing hospitals in Palm Beach County conspired with the South Florida Hospital Association ("SFHA") to create a so-called Preferred Provider Program ("PPP").[4] Under the PPP:

- the hospitals **jointly** agreed to boycott all but an arbitrary eight agencies unless they could not get a nurse; the eight chosen agencies would be denominated "Preferred";
- the hospitals **jointly** agreed collectively to solicit price bids from all agencies in the county, with bidding agencies aware that they either would become Preferred, or would cease doing business with the bulk of Palm Beach County hospitals (and suffer potentially catastrophic losses as their hospital nurses deserted them to work instead for Preferred agencies or hospitals);[5]

"A. I have tried somewhat to do that on my own. It did not work."

[4] Of the remaining hospitals, one later withdrew; one refused to join on advice of counsel; and one declined to participate because it did not use agency services pursuant to a collective bargaining arrangement with its nurses.

[5] Respondent High Tech Staffing Services, Inc. ("High Tech") – which became Preferred – admitted (in its Brief filed with the court of appeals below, at pages 9-10):

> "The 'preferred provider' program was formulated and prepared by the Defendant Hospitals for the benefit of the Defendant Hospitals. . . . HIGH TECH was an unwilling participant in the program and did not benefit by its participation in the program.

- the hospitals **jointly** agreed to require each Preferred agency to quote **identical** prices to **every** participating hospital, without volume assurances;
- the hospitals **jointly** agreed to require each Preferred agency to freeze and stabilize prices to all participating hospitals, with no further increases for a full year;
- the hospitals **jointly** agreed to impose added costs, requiring Preferred agencies to pay for insurance coverage for nurses, to treat nurses as agency employees rather than independent contractors (thereby subjecting agencies to various employee taxes), and to pay a two-percent "commission" to the SFHA on all PPP revenues;
- the hospitals **jointly** agreed to require the Preferred agencies not to solicit staff nurses at any participating hospital for agency work during the term of the PPP and for six months thereafter; however,
- under the PPP, the hospitals **jointly** refused to provide any assurances to the Preferred agencies of volume purchases – a prerequisite to volume pricing.

Once the Program was implemented, and the Preferred agencies became locked into contracts, each hospital

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* * *

> "HIGH TECH was doing hospital staffing business at an annual rate of one million dollars prior to the Preferred Provider Program. **HIGH TECH had only three alternatives when it received the unsolicited Request for Proposal: (1) bid, and hopefully win and continue doing business; (2) not bid and walk away from one million in annual revenues;** and/or (3) file a frivolous antitrust complaint."

(Emphasis added.) Faced with such extreme choices, High Tech opted to submit a bid.

remained free to decide, on its own, which of the eight Preferred agencies would be called, and how much (if any) agency nursing services would be purchased by that hospital. In other words, each hospital simply continued to purchase as an independent economic unit and there never was any group buying; it was a sham. In the fall of 1988, acting on the hospitals' behalf, the SFHA sent Requests for Proposals to agencies in Palm Beach County. Most temporary nursing agency petitioners reluctantly submitted bids.[6]

The hospitals remained dissatisfied with the prices bid by the agencies, and intimidated many into lowering their prices by eliminating several bidding agencies – solely on the basis of price – and demanding re-bids from the rest. In so doing, the hospitals suggested an acceptable price range.

The bid (and re-bid) prices generally, and some of the accepted bid prices, were higher than prices the hospitals had been paying to agencies, simply to cover the added costs imposed by the hospitals (discussed above). But bids also reflected reduced agency profit margins.

No petitioner was among the eight agencies jointly selected by the hospitals and the SFHA to survive the boycott. Each of the Preferred eight agencies then entered into 12 mandatorily-identical contracts with each of the 12 participating hospitals. While there was some variation in bid price schedules from one Preferred agency to

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[6] The PPP also purported to address perceived quality problems from agency nurses. The quality issue, discussed below, was not related to the hospitals' goal of containing agency prices, and quality problems could easily have been resolved without implementing the price-fixing and boycotting features of the PPP described above.

the next, each Preferred agency was required to fix its charges at **exactly the same price** to every participating hospital. Moreover, all Preferred agencies agreed – under collective compulsion from the hospitals – that prices would remain fixed and stabilized for the coming year.

C. The Hospitals And The SFHA Admitted That They Jointly Implemented The PPP To Fix And Stabilize Prices

Internal SFHA memoranda prove the hospitals' goal to stabilize and cap prices:

> The [SFHA] believes that the nursing shortage problem requires a long-term commitment to be resolved. **It views the Temporary Agency plan** [viz., the PPP] **as a solution to the problem of cost spiraling** and providing controls on quality.

(Letter of August 3, 1988, from respondent SFHA's president to respondent Bethesda Memorial Hospital's Chief Financial Officer. Emphasis added.)

Even more strikingly, the SFHA officer with chief responsibility for the PPP wrote – in November 1988 – of a similar PPP already in effect in Broward and Dade Counties (located south of Palm Beach County), and stated (emphasis added):

> There's no need to rehash the data; there *is* a shortage of nurses. It's acutely felt by the hospitals in South Florida, and so it logically becomes an issue for the South Florida Hospital Association to address.
>
> * * *
>
> In Palm Beach County, a similar process was taking place. **Hospital directors of nursing concerned about the $8 ¼ million spent on temporary nursing services were joining together to**

create a program. Learning of the SFHA activity in Broward and Dade, they contacted the Association.

* * *

We intend to emphasize to our hospitals that the agencies that chose to participate in our RFP process and were chosen to become part of our program have made a serious and substantial commitment to our hospitals.

1. They have agreed to hold prices for one year.

2. They have fulfilled our requirements for quality assurance, staff selection and training, and evaluations.

3. They have agreed to an employer/employee relationship with their nurses working in our hospitals.

* * *

In future years, **we hope the program will help reduce prices paid for temporary nursing services. At this point, after numerous price increases as the nursing shortage increased, the program stabilizes prices. However, that in itself is an accomplishment.**

The same SFHA officer testified that a goal of the PPP was to "stabilize prices," and that by "stabilize" he meant "to help keep the prices from raising [sic] so frequently." Hospital nursing administrators testified to similar effect.

D. Impact Of The Preferred Provider Program

Under the PPP, each hospital agreed not to use non-Preferred agencies' services unless no Preferred agency could meet its needs. Consequently, if a hospital nurse working for one of the petitioner agencies desired to work in a hospital setting, that nurse faced a terrible

dilemma: remain with a petitioner agency and not get placed at any hospital, or switch to a Preferred agency or become directly employed as a hospital staff nurse.

The SFHA, acting on the hospitals' behalf, permitted the Preferred agencies to publicize their Preferred status in advertisements. The purpose was to lure hospital nurses away from non-Preferred agencies. That is precisely what Respondent High Tech did.

Predictably, almost overnight, hospital nurses deserted the non-Preferred agencies – a result which a top SFHA officer testified was "just common sense."[7]

Even the Preferred agencies suffered under the coercive terms of the PPP. While the bid prices had been higher than prices respondents previously paid (because those higher prices reflected higher costs, as noted above), Preferred agencies' profit margins per nurse placement actually **declined** under the PPP (a fact not disputed). The Preferred agencies had hoped to offset the lower profit margins under the PPP with a higher volume of placements; however, the hospitals expressly refused to offer any volume assurances to bidding agencies. In fact, so many nurses fled back to hospital employment in the wake of the agency crisis created by the PPP that the hospitals' needs for agency nurses actually **declined**,

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[7] For example, shortly after the PPP was put into effect, petitioner Quality Professional Nursing ("QPN") saw its roster of some 130 nurses plummet to 20-30 nurses; petitioner Critical Health Care's ("CHC") roster fell from approximately 30 nurses to zero; and petitioner A Complete Health Service's ("A Complete") nursing shifts booked at county hospitals fell from a pre-PPP average of about 50 shifts per month to less than 5. Other non-Preferred agencies suffered similar fates.

even during peak winter months. The PPP not only devastated the boycotted agencies, but became a short-term losing proposition even for the Preferred agencies.

The lock-in of Preferred agencies' respective price schedules under the PPP enabled the hospitals – not similarly restricted – to raise pay for nurses without competitive increases by the Preferred agencies. The lock-in also enabled those Preferred agencies that had bid higher prices – but within the artificially stabilized price range – to lure nurses alway from lower-priced Preferred agencies. One such lower-priced Preferred agency, American Medical Staffing ("AMS"), seeing its nurses deserting it for higher-paying hospitals, asked the hospitals for permission to raise its prices to the levels of the higher-priced Preferred agencies. Even that request was denied.

A Preferred agency had the right to drop out of the PPP on 30 days notice (the "Escape Clause"). That option was meaningless. Dropping out would be tantamount to being boycotted, because it would lead to the same exodus of hospital nurses that petitioners and respondent High Tech justifiably feared in initially deciding to submit bids.

E. Disposition Of The Case By The District Court Below

In December 1988, petitioners and other boycotted agencies sued the SFHA, the 12 participating hospitals, and the eight Preferred agencies, for violations of federal and Florida antitrust law, including, *inter alia*, claims of *per se* illegal price fixing and group boycott, and,

alternatively, unreasonable restraint of trade under the rule of reason.[8]

Respondents denied wrongdoing and counterclaimed seeking a declaratory judgment that the PPP did not violate antitrust law.[9]

On February 21, 1989, the district court preliminarily enjoined the defendants from operating the PPP, *pendente lite*. Almost **immediately**, agency prices once again began to increase toward competitive equilibrium, as if the lid had been lifted from a boiling cauldron.

On November 13, 1989, the court of appeals vacated the injunction, because the district court failed to conduct an evidentiary hearing. *All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc.*, 887 F.2d 1535 (11th Cir. 1989).

The action was tried to a jury in early 1995. Over petitioners' objections, the district court issued a verdict form under which every antitrust claim – including claims of *per se* illegal price fixing and group boycott – hinged on whether the agencies had proven that the relevant market was limited to temporary nursing services to hospitals in Palm Beach County. The jury was instructed that if the agencies failed to prove the relevant market, **deliberations should go no further, and the jury**

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[8] Initially, petitioner The PDQ Nurse ("PDQ") filed a separate, parallel action, later consolidated with the main action. Petitioner CHC was added as a party in 1990.

[9] The hospitals also counterclaimed against one of the five petitioners, All Care Nursing Service ("All Care"), under federal and Florida RICO statutes (*inter alia*), for claimed fraudulent practices regarding billings and nurse certifications. No such counterclaims were brought against the other four Petitioners.

was required to find for the hospitals on all antitrust claims.

The jury found against the agencies on the relevant market question and thus never reached any other issues regarding the various antitrust claims.[10] The district court entered judgment in favor of the hospitals and the SFHA, as well as a declaratory judgment that the formation and operation of the PPP was legal, under antitrust law. The agencies timely moved for a new trial and renewed their motions for judgment as a matter of law. Those motions were denied. The agencies then appealed to the court of appeals below, which consolidated the appeals.

F. Disposition Of The Case By The Court Of Appeals

The court of appeals affirmed the district court's disposition of the antitrust claims.[11]

In its opinion, the Eleventh Circuit acknowledged that: (1) it is "undisputed" that "the PPP has some impact on the prices of obtaining temporary nurses" (App. 13) and "may stabilize prices to some degree" (App. 15); (2) under the PPP, Preferred agencies were to be selected jointly by the hospitals on the basis of price and other factors (App. 4); (3) the Preferred agencies were required not to raise their prices for one year (App. 5); and (4) the

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[10] The jury also found against All Care on the RICO counterclaims.

[11] The district court's disposition of the RICO counterclaims against All Care also was affirmed. That disposition, and the court of appeals' discussion of the RICO counterclaims in its opinion, are not before the Supreme Court in this Petition.

PPP arose in the context of a nursing shortage which caused agency price increases (App. 3).

Nonetheless, the court of appeals found no price fixing.

Significantly absent from the appellate court's opinion was any mention of economically and legally significant indisputable facts: (1) the PPP coercively stabilized and capped the Preferred agencies' prices to all participating hospitals; (2) while there was some pricing disparity from one Preferred agency to another, each Preferred agency was obligated to charge **identical** prices to every participating hospital; and (3) many boycotted agencies, including petitioners, were devastated and forced to exit the market. All of these factors reduced competition. All of these factors were a direct and foreseeable result of the PPP's structure and conduct.

The court also misconceived key facts: (1) it inexplicably reversed cause-and-effect by concluding that the higher bid prices had caused the hospitals to jointly impose added costs (discussed above) onto the agencies (App. 5 n. 5), although it is undisputed that those added costs were imposed **before** the bidding; (2) it viewed the "Escape Clause" as highly important in offering a meaningful option for Preferred agencies to thwart price fixing by the hospitals (App. 5-6, 14, 15), but ignored the indisputable evidence that "escaping" would have been futile – tantamount to losing the bidding in the first place – and that even Preferred agencies suffering under the PPP did not seek to "escape" from it; and (3) it incorrectly stated that non-Preferred agencies did "more than a trifling" of business with the hospitals under the PPP (App. 17), when in fact only a few non-Preferred agencies even were able to do any business, and even then only by covertly

subcontracting their few remaining nurses **through Preferred agencies**, with the hospitals continuing to enjoy the price caps to which the Preferred agencies artificially were bound.

The Eleventh Circuit opinion acknowledged that price fixing is *per se* illegal, whether by sellers or by purchasers (App. 13). This acknowledgment, while academically correct, was devoid of any mention of the broad definition of *per se* illegal price fixing (encompassing raising, lowering, fixing, pegging or stabilizing of prices) which this Court recently reiterated in its *per curiam* reversal of the Eleventh Circuit in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (discussed *infra*) – another case in which the Eleventh Circuit egregiously erred by construing price fixing too narrowly, leading it to find in favor of defendants who, as this Court later ruled, were guilty of *per se* illegal antitrust violations. Here, once again, the court of appeals, by construing price fixing far more narrowly than is dictated by this Court, fashioned its own "Escape Clause" for antitrust defendants, holding that "[i]n forming the PPP, the hospitals, among themselves, never agreed to a uniform price, to an acceptable price range, or to a scale for determining prices" (App. 13-14). The Eleventh Circuit simply ignored the fact that the PPP was established for the express purpose, and with the intended effect, to cause each agency's prices to be capped, stabilized and identical for every hospital. Instead, the court erroneously concluded: "But we do not have an agreement to fix prices in this case: no prices were preset for nursing services" (App. 15).

Also strikingly absent from the Eleventh Circuit opinion was acknowledgment that the PPP's impact on

prices resulted from a horizontal combination of competing hospitals. Rather, the appellate court focused almost exclusively on the hospitals' post-contract non-group purchases, and it labeled that conduct "vertical," even though the terms of the purchases were determined by earlier **horizontal** conduct. (App. 15 n. 14.) The court relied on its mischaracterization of the conduct as "vertical" to justify applying the rule of reason.

Paradoxically, the Eleventh Circuit also mischaracterized the PPP as a "joint-buying arrangement" by the hospitals (App. 4), to justify rule-of-reason treatment, even though the hospitals never purchased under the PPP as a group. Once the bidding ended and each Preferred agency was locked into identical fixed-price contracts with each of the participating hospitals, any orders were to be placed by the hospitals acting independently, with no volume assurances. That the PPP was never to be a "group buying arrangement" is underscored by the undisputed fact that each Preferred agency was forced to enter into 12 separate – but identical – contracts with each participating hospital.

Having concluded that the PPP did not constitute price fixing, despite the fact that it was a sham buying cooperative, the court of appeals also determined that the agencies' group boycott claim must be assessed under the rule of reason (App. 16-17), altogether ignoring binding precedent (discussed below) condemning *per se* group boycotts in furtherance of price fixing.

Finally, turning to the rule of reason (App. 17-19), the Eleventh Circuit limited its discussion to the need for proof of the relevant market, and conspicuously ignored dispositive controlling authority summarily condemning

naked horizontal restrictions on pricing under the rule of reason, without proof of the relevant market.

REASONS TO GRANT THIS PETITION

I. PUBLIC ANTITRUST POLICY, THIS COURT'S COMMITMENT TO THE *PER SE* RULE FOR HORIZONTAL COLLUSION, AND AVOIDANCE OF CONFLICTS AMONG CIRCUITS, ALL FAVOR GRANTING THIS PETITION

At least twice this decade – in *Palmer, supra,* and in *FTC v. Superior Court Trial Lawyers Association,* 493 U.S. 411 (1990) – this Court has heeded the call to overturn decisions by federal courts of appeals which had willfully refused to condemn, as *per se* illegal, joint conduct among competitors constituting price fixing. In both instances, the circuit courts, using the rule of reason, were prepared to allow the defendants to escape antitrust liability altogether, for conduct which this Court instead deemed *per se* violative. This Court granted certiorari in those cases out of a strong concern that, otherwise, lower courts would embrace the appellate courts' opinions and further eviscerate our nation's antitrust laws – laws which this Court has termed the "Magna Carta of free enterprise." *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610 (1972).

To prevent such injustices and underscore the commitment to fostering the goals of antitrust law, this Court in *Superior Court* made clear that the *per se* rule has "the same force and effect as any other statutory commands" and that it is not merely a tool of administrative convenience to be ignored at lower courts' discretion. *Id.,* 493 U.S. at 433. And while this Court has at times adapted

substantive law to provide for rule-of-reason treatment where the *per se* rule previously had overreached, such occasions have been rare – and even then it was this Court, not lower courts, which made that decision.[12]

Here, once again, our free enterprise system and our antitrust laws stand threatened by a precedent certain to spawn more and yet-cleverer schemes for fixing prices. Unchecked, the decision below telegraphs a powerful message to price fixers: concoct a scheme with a modicum of complexity, toss in a few mirrors and some smoke, and courts will cite the Eleventh Circuit's decision below to declare the scheme too novel for *per se* treatment.

In addition, the Eleventh Circuit's refusal to condemn *per se* collaboration among competitors that halted free-market price increases during a time of shortage inherently conflicts with the Seventh Circuit in *National Macaroni Manufacturers Association v. FTC*, 345 F.2d 421 (7th Cir. 1965). There, a complex scheme to "fix[ ] the composition of macaroni products . . . to ward off price competition for durum wheat in short supply by lowering total industry demand to the level of available supply" was found to be illegal *per se* – regardless of whether the participants, competing buyers of durum wheat, set specific prices or had market power (345 F.2d at 426-27). The Seventh Circuit's approach to the issue, which would

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[12] For example, this Court recently excepted **vertical** price fixing in the setting of maximum resale prices, so that it would be assessed under the rule of reason. *State Oil Co. v. Khan*, 522 U.S. 3 (1997). But even so, while the Seventh Circuit below encouraged this Court to make such a change in substantive law, it did **not** arrogate to itself the discretion to make that change.

have yielded a totally different outcome in the instant action, was cited approvingly just this year by the Tenth Circuit in *Law v. NCAA*, 134 F.3d 1010, 1017 (10th Cir. 1998).

The opinion below also creates a significant conflict among circuits concerning the scope of the exception to *per se* illegality established in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), and its progeny. In *Law, supra*, 134 F.3d at 1021, the Tenth Circuit construed that exception narrowly, as petitioners herein believe this Court intended, so as to permit rule-of-reason treatment **only** where price fixing is ancillary to achievement of an **otherwise-unattainable** procompetitive goal (usually the very existence of a market); whereas here, the Eleventh Circuit applied *BMI* so cavalierly that it opened a gaping hole which swallows the *per se* rule. (The *BMI* issue is discussed *infra.)*

Finally, as shown *infra*, the opinion below conflicts with Department of Justice and FTC guidelines, which would condemn the PPP as illegal price fixing, *per se*.

II. THE ELEVENTH CIRCUIT'S FUNDAMENTAL MISCONCEPTIONS OF HORIZONTAL PRICE FIXING MUST BE OVERTURNED

The court of appeals below, in assessing the agencies' price-fixing claims, has committed four fundamental blunders, each warranting the granting of this petition.

A. The Standard For Price Fixing Was Misconstrued

Here, as in *Palmer*, the Eleventh Circuit plainly misconceived the scope of proscribed price fixing, even

though it has long been held to broadly encompass contracts, combinations or conspiracies which raise, lower, fix, peg or stabilize prices. *Palmer, supra*, 498 U.S. at 48; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). The appellate court erred by misconstruing that breadth. Instead, it found no price fixing here because "[i]n forming the PPP, the hospitals, among themselves, never agreed to a uniform price, to an acceptable price range, or to a scale for determining bids." (App. 13-14.) But the undisputed record showed, in contrast, that under the PPP the hospitals in fact **did agree** on price ranges, by jointly deciding: (1) to accept some bids and to reject others; (2) to eliminate agencies on the basis of prices bid; (3) to demand re-bids; (4) to require that each Preferred agency freeze its prices for a year; (5) to demand that each Preferred agency give identical prices to every hospital; (6) to impose added costs onto the agencies; and (7) to restrict **themselves and each other** to using **only** Preferred agencies absent exigent circumstances.

The Eleventh Circuit's narrow interpretation of the price-fixing proscription, and its refusal to condemn the PPP as price fixing despite admissions from key SFHA and hospital personnel that it was formed to stabilize prices, reflect the very same misguided view of price fixing which led to this Court's *per curiam* reversal of the Eleventh Circuit in *Palmer*.

Less than a decade ago, in *Palmer*, the Eleventh Circuit refused to apply the *per se* rule because the challenged agreement did not directly address pricing and was "not a classic form of price fixing where two competitors agreed what price they would charge for their products." *Palmer v. BRG of Georgia, Inc.*, 874 F.2d 1417, 1424

(11th Cir. 1989). There, as here, the lower court elevated form over substance of the illegal conduct; and, finding the form unusual, the court felt free to ignore the *per se* rule. This Court could not have been clearer in its reversal in *Palmer*, based just on the certiorari petition: horizontal tampering with free-market pricing mechanisms is *per se* illegal, whether its form is garden-variety or imaginative.

Yet here, the Eleventh Circuit again commits the very same error. *Deja vu*: it ignores the substance of the PPP, through which competing hospitals consciously sought to suppress competition from the agencies, and thereby halt or minimize further price increases during a shortage of nurses – when the free market dictates competitive price increases as the antidote for solving that shortage.

What captivated the Eleventh Circuit, and led to its error below, was that the hospitals did not actually "set" the prices; they merely established the mechanism by which suppliers' prices would be forcibly capped, stabilized, and made uniformly available to every participating hospital – a result that the respondent hospitals had found themselves unable to achieve, individually. Thus, the Eleventh Circuit here followed the same narrow approach to defining price fixing as it did in *Palmer*.

However, it is well-settled that price fixing agreements need not be direct, but rather may be tacit and indirect. *See, e.g.*: *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (condemning complex "Open Competition Plan" which restrained competition and led to higher prices); *United States v. Linseed Oil Co.*, 262 U.S. 371 (1923). *See also United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 310 (1956) (it "makes no difference

whether the price fixing is accomplished by express contract **or by some more subtle means** [emphasis added]"). Indeed, in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (*per curiam*), this Court condemned, as *per se* illegal price fixing, a horizontal agreement to refuse to give credits – even though no actual prices, or price ranges, had been agreed upon.

To the same effect is *Socony-Vacuum, supra*, condemning indirect price fixing among competing buyers, which agreed to buy up surplus gasoline in order to prop up and stabilize selling prices. There, this Court stressed:

> Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. . . . An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices **whatever machinery for price-fixing was used**.

Id. at 222; emphasis added.[13]

Here, common sense, bolstered by well-settled case law, dictates that there should be no different treatment even though the hospitals did not themselves explicitly "set" the prices or price ranges bid by the agencies. The PPP itself was born of the hospitals' desire to contain

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[13] For an extensive listing of some 19 different forms of horizontal price fixing which courts have condemned – "some of which do not at first blush appear to affect price" – *see* 2 J. O. Von Kalinowski *Antitrust Laws and Trade Regulation* § 6A.03[1] (1992), at pages 6A-11-15. The wide variety makes readily apparent both that such agreements need not directly set prices, and that the **forms** through which free-market pricing is tampered with are limited only by the imagination of the tortfeasors.

prices, as the quotations above from SFHA personnel graphically attest. Having implemented the Program, all the hospitals had to do was sit back and watch as the agencies, fearing exclusion, were coerced into submitting "bids" reflecting lower profit margins for the agencies – a result which, as shown above, no hospital could have achieved without collaboration with competing hospitals. In sum, the PPP amounts to blatant horizontal price fixing.[14]

B. The *"BMI"* Exception To *Per Se* Illegality Was Misconstrued

The court below misapplied *BMI, supra,* by stretching it so wide as to make the exception swallow the rule.

Once conduct is determined to qualify as price fixing – a finding which should have been made here – it can escape *per se* condemnation only in exceedingly narrow circumstances. In *BMI,* this Court permitted such a departure because some price fixing was essential to the existence of a "blanket license." *Id.*, 441 U.S. at 21-22.

Likewise, in *NCAA v. Board of Regents of University of Oklahoma,* 468 U.S. 85 (1984), this Court again departed

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[14] The Eleventh Circuit also placed heavy and repeated emphasis on the so-called "Escape Clause" under which a Preferred agency could drop out of the PPP on 30 days notice (App. 5-6, 14, 15) – as if that clause, by itself, somehow altered the coercive price-fixing nature of the PPP. However, the "Escape Clause" was, at best, illusory: dropping out of the PPP would have been tantamount to losing the bidding in the first place; would have proved disastrous for the agency; and would have resulted in the loss of its hospital nurses. That is why, despite the fact that the PPP also injured the Preferred agencies (discussed *supra*), no Preferred agency ever exercised the "Escape Clause."

from the *per se* rule because "horizontal restraints competition are essential if the product is to be available at all." *Id.*, 468 U.S. at 101.

Here, in contrast, the Eleventh Circuit has repeatedly invoked *BMI* **not** for its narrowness, but instead as purported precedent for exempting almost any price-fixing scheme. (App. 13, 14.) In so doing, the Eleventh Circuit ignores this Court's rigid requirements in *BMI* and *NCAA* for escaping the *per se* rule and creates an inter-circuit conflict (discussed *supra*), while simultaneously ignoring its own precedent.[15]

Moreover, the Eleventh Circuit's opinion is devoid of any proper "procompetitive" basis for allowing the PPP to escape *per se* treatment – much less a showing that it was essential for the hospitals to combine to create some new product, **or** that price fixing was needed for there to be a market at all, **or** even that an otherwise unattainable procompetitive benefit existed to which the price-fixing features of the PPP were ancillary.[16]

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[15] In *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986), the Eleventh Circuit recognized the narrowness of the *BMI* exception, holding that it applies only where the restraint "is no greater than reasonably necessary to achieve a legitimate commercial objective" and is ancillary to and counterbalanced by "otherwise unattainable procompetitive benefits." (*Id.* at 601.) Here, such an evidentiary showing was not made by respondents and was not even considered by the appellate court.

[16] The hospitals may have had some legitimate quality concerns about particular agencies or nurses. Individual hospitals already had "do not use" nurse lists; thus a less restrictive alternative already existed. More importantly, the hospitals plainly **could** have met for the narrow purpose of addressing shared quality concerns **without seeking to cap and**

Price increases arising from competitive forces in times of shortage are never welcomed by buyers, and may cause budgetary inconvenience. Nevertheless, "the statutory policy underlying the Sherman Act 'precludes inquiry into the question whether competition is good or bad.' " *Superior Court, supra,* 493 U.S. at 424. Moreover, while in *BMI* and *NCAA* this court found that the industries at issue had unique attributes necessitating price fixing, it is also settled that no such justification automatically arises for health care (*Arizona v. Maricopa County Medical Society,* 457 U.S. 332 (1982)) or professions (*Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975)).

C. The Court Below Deemed Horizontal Conduct To Be Vertical

The Eleventh Circuit's opinion below (App. 15 n. 14) also threatens to undermine this Court's precedents and the *per se* rule by mischaracterizing the PPP as vertical, so as to justify rule-of-reason treatment, when in truth and in substance the PPP was purely horizontal. As the Eleventh Circuit saw it, because the hospitals did not themselves dictate the Preferred agencies' prices, their horizontal combination is somehow irrelevant, and the focus must be on the vertical conduct of purchasing that followed the horizontal establishment and forced implementation of the PPP. Such an approach guts the *per se* rule against horizontal price fixing: every price fixing agreement among competitors, no matter how direct, is entered into for the purpose of impacting the conspirators' subsequent selling prices or purchasing prices – *i.e.*, in either case, the conspiracy, while formed horizontally,

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stabilize prices, and without jointly boycotting agencies. The Eleventh Circuit simply ignores this critical issue.

is designed to affect the conspirators' **vertical** relationships.[17]

D. The PPP Was Not An Instance Of Procompetitive Group Buying

The Eleventh Circuit casually referred to the PPP as an example of group buying (App. 4), another flawed basis to justify its rule-of-reason treatment. As this Court recognized in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985), group buying cooperatives enable smaller buyers to aggregate their purchase volumes and thereby obtain discounts available on the open market to larger competitors. Here, by contrast, there was no "group buying," no aggregation of purchasing volumes (no volume assurances), and no "procompetitive" need for the hospitals to combine to match lower agency prices being obtained by other buyers (there were no other buyers getting lower prices). Rather, once the hospitals jointly established the PPP and coerced each Preferred agency to enter into identical contracts with each hospital fixing the terms for later purchases, actual buying, if any, was conducted strictly on a one-to-one basis between a participating hospital and any Preferred agency it might call.[18]

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[17] *Cf. Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 731 n. 4 (1988): "[A] facially vertical restraint imposed by a manufacturer only because it has been coerced by a 'horizontal carte[l]' agreement among his distributors is in reality a horizontal restraint."

[18] Thus, the PPP also runs afoul of the Department of Justice and FTC's joint "Statements of Antitrust Enforcement in Health Care" of August, 1996, 4 Trade Reg. Rep. (CCH) ¶ 13,153, which provide (at p. 20,812 n. 17): "An agreement among

III. THE ELEVENTH CIRCUIT'S FUNDAMENTAL MISCONCEPTIONS OF *PER SE* ILLEGAL GROUP BOYCOTTS MUST BE OVERTURNED

The Eleventh Circuit's fundamental mistreatment of petitioners' price-fixing claims also led it to rule that the PPP was not a *per se* illegal group boycott, contrary to binding precedent from this Court. (App. 16-17.) The hospitals' joint conduct in excluding all but a handful of agencies from the PPP obviously was a boycott, relegating the losers to last-resort status and causing their hospital nurses to flee, resulting in the closure of agencies, including petitioners. Because the PPP was a boycott in furtherance of horizontal price fixing, it must be condemned *per se*. Inquiry into relevant market and market power issues its superfluous and irrelevant; it stands the *per se* rule on its head.

This outcome is mandated under *Superior Court*, *supra*, where this Court reversed the District of Columbia Circuit for its comparable refusal to apply the *per se* rule. Yet the Eleventh Circuit, in its discussion of group boycott issues, never even once mentions *Superior Court*. Instead, the court cited repeatedly to *Northwest Wholesale*, *supra*, to justify rule-of-reason treatment for the PPP. However, this Court made crystal clear in *Superior Court* (493 U.S. at 436 n. 19) that group boycotts with horizontal price-fixing features are *per se* illegal, and cases cited by the dissent – including *Northwest Wholesale* – were expressly deemed inapplicable. For the Eleventh Circuit to ignore this Court's decisions is inexplicable.

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purchasers that simply fixes the price that each purchaser will pay or offer to pay for a product is not a legitimate joint purchasing arrangement and is a per se violation."

IV. THE PPP SHOULD BE SUMMARILY CONDEMNED EVEN UNDER THE RULE OF REASON

The Eleventh Circuit also, in fashioning its opinion (App. 17-19), ignored precedent from this Court holding that horizontal arrangements which constitute naked restraints on price are to be condemned without any showing of market power within a relevant market, even under the rule of reason. In *NCAA*, *supra*, a rule-of-reason case, this Court flatly stated:

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." . . . **We have never required proof of market power in such a case.** This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.

468 U.S. at 110; emphasis added. Here, the PPP – implemented to cap and stabilize prices – was nothing more than a "naked restriction" on prices and merits summary condemnation.

Lastly, the Program not only eliminated many agencies from the market, but also, by suppressing competition for nurses among the hospitals and agencies,

ironically threatened to reduce aggregate nurse "output" and exacerbate the very nursing shortage that gave rise to the spiraling agency prices in the first place. As such, the PPP also merits summary condemnation under the rule of reason, without determination of relevant market and market power issues, under *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986) (" 'proof of actual detrimental effects, such as a reduction in output,' can obviate the need for an inquiry into market power").

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4714

D.C. Docket No. 88-8568-CIV-JCP

ALL CARE NURSING SERVICE, INC., BENSON HEALTH CARE SERVICES, INC., et. al.,

Plaintiffs-Appellees,

versus

HIGH TECH STAFFING SERVICES, INC.,

Defendant-Appellant.

No. 95-5218

D.C. Docket No. 88-8568-CIV-JCP

ALL CARE NURSING SERVICE, INC.,

Plaintiff-Appellant,

A COMPLETE HEALTH SERVICE, INC., QUALITY PROFESSIONAL NURSING, INC., et al.,

Plaintiffs-Appellants,

JULIE MONAHAN,

Counter-Defendant-Appellant,

versus

BETHESDA MEMORIAL HOSPITAL, INC.,
NME HOSPITALS, INC., et. al.,

Defendants-Appellees,

HIGH TECH STAFFING SERVICES, INC.,

Defendant-Appellant-
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(Filed February 18, 1998)

Before EDMONDSON and BARKETT, Circuit Judges, and WELLFORD*, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

Two separate actions (with different plaintiffs) against the same defendants for alleged antitrust violations have been consolidated and are treated as one appeal. Plaintiffs appeal a jury verdict for defendants on antitrust claims. They also appeal the jury verdict against them on counterclaims for state and federal RICO violations. Many issues were raised on appeal. But we conclude that most of the challenges obviously lack merit, and we do not discuss them in this opinion. We do discuss a couple of issues in some detail, and we affirm the district courts' judgments.

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* Honorable Harry W. Wellford, Senior U.S. Circuit Judge Sixth Circuit, sitting by designation.

Background

Beginning in the mid-1980's the United States experienced a severe nursing shortage. Southern Florida was hit especially hard due to its increased demand for nurses in winter months to accommodate the high influx of people to the area at that time of year. This shortage, along with other market considerations, caused an increase in prices for nursing services and a difficulty in staffing hospitals (and other facilities) with sufficiently licensed nurses.[1]

Hospitals use full or part-time hospital nurses, contract nurses (nurses hired for a specified period of time), travel nurses (contract nurses hired from different areas of the country), and temporary nurses (nurses employed by agencies and hired by hospitals for a shift at a time).[2] Temporary nursing agencies send their nurses to hospitals, nursing homes, clinics, doctors' offices, and patients' homes. They have the choice to provide services for any facility or person in need of such care. They are not limited to providing nurses to hospitals.

During the pertinent period, hospitals were faced with quality concerns, as well as rising prices. No efficient means existed to share information with other hospitals about agency nurses. This lack of information resulted in problems with some agencies, including plaintiff-appellant All Care Nursing Services, Inc. ("All

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[1] Nurse qualifications fall into at least three different licensing categories: Registered Nurse (RN), Licensed Practical Nurse (LPN), and Certified Nursing Assistant (CNA).

[2] These temporary nursing agencies are also providers of travel and contract nurses to hospitals.

Care").[3] These problems included "phantom booking" – where a hospital requests a specific nurse with whom it has dealt in the past, only to be sent a different nurse; "blind booking" – where a hospital sets up to receive the services of a nurse from an agency only to have the agency cancel at the last minute; fraudulent billing – billing hospitals for services of an RN when actually a less qualified LPN or CNA performed the services; cheating on certification exams; and altering certification documents.

In response to the problems the South Florida Hospital Association ("SFHA") approached hospitals in Palm Beach County about a potential purchasing arrangement. In 1988, twelve (12) Palm Beach County hospitals set up an arrangement whereby they would solicit bids from temporary nursing agencies and would then select agencies to be preferred providers of such services, the Preferred Provider Program ("PPP"). The selection of the preferred agencies was to be made based upon competence, services provided, quality, and bid price. Under this joint-buying arrangement all the participating hospitals agreed to seek first nurses from preferred providers before going to nonpreferred agencies for nurses on each occasion.

All agencies were invited, either by letter or by advertisement in the Palm Beach newspaper (*Palm Beach*

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[3] The problems described formed the basis of the counterclaim against All Care and Monahan for federal and state RICO violations.

Post), to participate in the bidding. Sixteen (16) agencies presented bids and eight (8) were selected as preferred.[4]

In November 1988, the PPP began operation. Each hospital entered into individual contracts with each of the preferred agencies. All the agencies selected as preferred providers were required to agree to things like treating their nurses as employees by providing workers' compensation, paying taxes, and providing necessary insurance. Before the PPP, agencies had treated their nurses as independent contractors, not employees; and the higher costs associated with unprotected workers were borne by the hospitals.[5]

The preferred agencies did not contract with the hospitals at the same prices, but instead at the prices that each particular agency had bid. Agencies were also required to agree in the contracts not to change their prices for one year – the length of each contract – and, thus, were somewhat tied into their bid prices. But to

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[4] Some of the appellant agencies participated in the bidding process, others did not. Following the submission of the initial bids four (4) agencies were eliminated based on their bid prices, which in some instances were 50% higher than other agencies' bids. The remaining twelve (12) rebid and were considered using the established criteria. Which agencies actually resubmitted bids is unclear. But, all of the accepted agencies bid prices higher than the price ranges suggested by the SFHA in its invitation to bid. None of the appellants was selected as preferred providers.

[5] The hospitals felt the need to place some of the financial burden on the agencies because after the bidding, agency services were actually costing more than before the PPP. These contract provisions were a way to shift some of the cost back to the agencies.

allow for shifts due to market changes, each agency could terminate its contract with a particular hospital upon 30 days notice (the "escape clause").

After the creation of the PPP, plaintiffs-appellants filed suit against the participating hospitals, preferred agencies, and the SFHA[6] alleging antitrust violations under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and under Florida Statutes §§ 542.18 and 542.19. Defendants then filed a counterclaim against All Care, and its operator Monahan, for violations of federal and state RICO statutes by billing fraudulently, aiding cheating on certification exams, and aiding persons to obtain false certification.[7]

Awaiting trial, plaintiffs-appellants sought and received a preliminary injunction, which halted implementation of the PPP. That preliminary injunction, however, was vacated by this court because of the district court's failure to hold the necessary evidentiary hearing. *All Care Nursing Serv., Inc. v. Bethesda Memorial Hosp., Inc.*, 887 F.2d 1535 (11th Cir. 1989). The request for an injunction was never reinstated.

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[6] Plaintiffs-appellants include: All Care Nursing Services, Inc.; A Complete Health Care Services, Inc.; Benson's Health Care Services, Inc.; Critical Health Care, Inc.; Quality Professional Nursing of Florida, Inc.; and P.D.Q. Nurse, Inc.

Defendants-appellees include the SFHA, twelve (12) Palm Beach County hospitals, and four (4) remaining agency defendants (four (4) agencies settled with plaintiffs before final disposition in the district court).

[7] Claims of fraud, civil theft, and false representation against All Care and Monahan were dismissed before trial.

After a four-week jury trial, a verdict was entered in favor of defendants on all relevant claims. Plaintiffs filed motions for new trial, for judgment as a matter of law, and for amendment of the pleadings to conform with the evidence. All these motions were denied by the district court; and we now affirm those denials.[8] Plaintiffs-appellants also appeal the antitrust and RICO counterclaim verdicts against them; but we affirm those judgments, too.

Discussion

I. Federal and State RICO Claims

Plaintiffs-appellants All Care and Monahan argue that the Florida and Federal RICO claims against them are barred by the economic-loss rule. That rule provides that "parties to a contract can only seek tort damages if conduct occurs that establishes a tort distinguishable from or independent of [the] breach of contract." *Jones v. Childers*, 18 F.3d 899, 904 (11th Cir. 1994) (citations and quotations omitted). The rule is based upon the idea that "contract principles are more appropriate than tort principles for resolving economic loss claims." *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So.2d 899, 901 (Fla. 1987).

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[8] Also affirmed is the district court's decision in the bench trial of Defendant High Tech's Lanham Act counterclaim.

Neither All Care nor Monahan can use the economic-loss rule to escape liability under the federal RICO statutes.[9] We have already ruled that Florida's economic-loss rule does not bar a plaintiff from "bringing a [federal] RICO action where a breach of contract claim also exists . . . . many RICO cases involve contract disputes." *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472, 1478 (11th Cir. 1991).

About the state RICO claims, Florida's RICO statutes have consistently been interpreted using federal RICO claims cases. No reason has been presented to us to justify applying the economic-loss rule differently to RICO claims made under state and federal RICO statutes.[10] Thus, the economic-loss rule does not bar these claims.

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[9] Defendants argue that Monahan cannot be afforded the benefit of the economic-loss rule because she, individually, entered into no contract with the defendant hospitals: she lacked privity of contract. All contracts were between her agency, All Care, and the hospitals. Because we conclude that the economic-loss rule does not bar RICO claims, state or federal, we need not decide this question. But, the Florida Supreme Court has held, at least under one set of facts, that privity is not required for the economic-loss rule to apply. *See Casa Clara Condominium Ass'n v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244 (Fla. 1993); *see also Hoseline, Inc. v. U.S.A. Diversified Products, Inc.*, 40 F.3d 1198, 1200 (11th Cir. 1994) (where this court applied *Casa Clara* to make "meritless" a claim that the rule does not bar tort claims between parties who lack contractual privity).

[10] Plaintiffs-appellants also challenged the RICO counterclaims on another ground: that reliance on the alleged misrepresentations made by All Care and Monahan was not proved by defendants. Reliance is only an element of a RICO claim to the extent that a RICO plaintiff must prove he was

II. Antitrust Claims

Plaintiffs-appellants argue that the formation and operation of the Palm Beach County PPP is a violation of the antitrust laws of the Sherman Act and Florida Statutes §§ 542.18 and 542.19,[11] prohibiting restraints on trade. The Sherman Act, in relevant part, sets out these rules:

> Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .
>
> Section 2: Every person who shall monopolize, or attempt to monopolize, or combine or

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injured by reason of the RICO defendant's deception and fraud. *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991). But, no argument is made by the plaintiffs-appellants that injury was inadequately shown. So, lack of reliance does not require reversal on this claim.

[11] Federal and Florida antitrust laws are analyzed under the same rules and case law. Fla. Stat. § 542.32 ("It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes."); *see also St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc.*, 457 So.2d 1028, 1032 (Fla. Dist. Ct. App. 1984) ("[T]he Florida legislature has, in effect, adopted as the law of Florida the body of antitrust law developed by the federal courts under the Sherman Act."); Fla. Stat. §§ 542.16 (Florida antitrust laws complement federal antitrust laws), 542.18 (analogous to § 1 of the Sherman Act). So, for purposes of this opinion discussion of the law under the Sherman Act is equally applicable to the plaintiffs-appellants' state antitrust claims.

> conspire . . . to monopolize . . . shall be deemed guilty of a felony.

15 U.S.C. § 1; 15 U.S.C. § 2.

Despite the expansive language of the statute, the Supreme Court has interpreted this statute to prohibit only "unreasonable" restraints on trade. "A restraint may be violative of the Sherman Act because it is solely a naked restraint of trade so offensive to competition as to be unreasonable per se, or because it runs afoul of the more detailed rule of reason inquiry." *Retina Assocs., P.A. v. Southern Baptist Hosp. of Florida, Inc.*, 105 F.3d 1376, 1380 (11th Cir. 1997).

Some acts have been said to be so facially anticompetitive that by their very nature they are deemed unreasonable and, thus, per se violative of antitrust laws. These "practices are 'so plainly anticompetitive,' and so often 'lack . . . any redeeming virtue,' that they are conclusively presumed illegal without further examination under the rule of reason. . . . " *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 7-8, 99 S.Ct. 1551, 1556 (1979) (internal citations omitted) ("*BMI*"). Price fixing, horizontal market divisions, tying arrangements, and group boycotts have emerged as practices that are generally illegal per se. *See National Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 779 F.2d 592, 598 (11th Cir. 1986) (citing *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 [1960]); *State Oil Co. v. Khan*, 118 S.Ct. 275 (1997); *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941).

"But easy labels do not always supply ready answers." *BMI*, 441 U.S. at 8, 99 S.Ct. at 1556. Since the emergence of these per se categories, we have stressed that "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same – whether or not the challenged restraint enhances competition." *National Bancard Corp.*, 779 F.2d at 598 (citation and quotation omitted). The Supreme Court, as well, has refused to force various practices into "pigeonhole[s] and [to invoke] the per se rule." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458, 106 S.Ct. 2009, 2018 (1986).

A "rule of reason" is generally applied to determine what acts are permissible. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60 (1911). Thus, a presumption exists that the circumstances of a case will be looked at in the light of the rule of reason standard and will not be deemed per se unreasonable. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723, 726 (1988). But, there are no bright lines. "The decision to apply the per se rule [instead of the rule of reason] turns on 'whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 289-90, 105 S.Ct. 2613, 2617 (1985).

In *Northwest*, the Supreme Court observed that what activities might fall into a per se category is "far from certain." *Id.* at 294, 105 S.Ct. at 2619. Considerable inquiry into the market conditions and market power of the

defendant is often necessary before conduct can be presumed to be anticompetitive. *Id.* at 296, 105 S.Ct. at 2620-21 (addressing group boycotts).

Plaintiffs-appellants claim that the PPP's arrangement is per se illegal as both price fixing and as a group boycott. Thus, plaintiffs-appellants have the burden to make a threshold showing that the PPP falls into one of these forbidden categories. *See Id.* [sic] at 298, 105 S.Ct. at 2621. In this case, plaintiffs-appellants allege that, because price bids were a consideration in determining which temporary nurse agencies would become preferred providers, this conduct falls into the forbidden category of price fixing. They also claim that the exclusion of the nonpreferred agencies from the PPP amounts to a group boycott.

The decision whether the PPP established by defendants-appellees amounts to either a price fix or a group boycott, deserving of per se treatment, determines the antitrust issue on appeal.[12]

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[12] If we decide the PPP is deserving of per se treatment the case ends; plaintiffs-appellants must win. But if we decide that conduct such as the establishment of the PPP does not rise to the level of anticompetitiveness necessary to hold it per se illegal, the rule of reason applies; and we will defer to the determination of the jury – that plaintiffs-appellants failed to establish the relevant market in which to judge the PPP's reasonableness.

A. Per se Violations

1. Price Fixing

That the PPP has some impact on the prices of obtaining temporary nurses is undisputed. That price fixing is equally violative of antitrust laws whether it is done by buyers or sellers is also undisputed. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 68 S.Ct. 996, 1005-06 (1948). And, it is no excuse that the price "fixed" is reasonable. *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S.Ct. 768, 775 (1990). But whether the per se rule should apply "is not a question simply of determining whether two or more potential competitors have literally 'fixed' a 'price.' " *BMI*, 441 U.S. at 9, 99 S.Ct. at 1556-57.

Plaintiffs-appellants argue that the intent of the PPP was to stabilize prices and that such intent makes this practice a per se violation. But anticompetitive effects – not intent – is the focal point of antitrust legislation. The question is not did defendants intend to fix prices, but instead whether the PPP did so. In defining "price fixing" the Supreme Court wrote in these terms:

> That price-fixing includes more than the mere establishment of uniform prices is clearly evident. . . . [P]rices are fixed . . . if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform. . . . They are fixed because they are agreed upon.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222-23 (1940). In forming the PPP, the hospitals, among

themselves, never agreed to a uniform price, to an acceptable price range,[13] or to a scale for determining price.

The PPP has an impact on price; all preferred agencies contracting with the hospitals will, to some degree, be tied into a set price for their services. But this point of law must be remembered: "Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints." *BMI*, 441 U.S. at 23, 99 S.Ct. at 1564. And, it cannot be forgotten that market fluctuations could result in a preferred agency's exercise of the escape clause – allowing that agency to reenter the market free to charge the prices it chooses. Most important, this case involves lots of distinct contracts. A pricing agreement of some kind is necessary in the contracting for goods and services; and competitive bidding is an acceptable way to decide with whom the hospitals wish to contract.

Earlier Supreme Court cases were faced with more direct price fixing, which led to the per se categorization of such schemes. In the context of a blatant agreement to fix prices,

> [i]t makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large

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[13] That the SFHA – when it requested bids – suggested a price range to the participating agencies does not create an agreement on the prices they would accept. As shown by the accepted bids, prices outside the range were acceptable.

> or small; or whether the effect of the agreement is to raise or to decrease prices.

United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310 (1956). But we do not have an agreement to fix prices in this case: no prices were preset for nursing services.

The Supreme Court has recently taken another step away from per se treatment, particularly in vertical price fixing arrangements.[14] *See State Oil Co. v. Khan*, 118 S.Ct. 275 (1997). Vertical price fixing is no longer a per se violation. *Id.* at 278.

The key to per se treatment is whether the conduct is of the kind that can only be anticompetitive. But, the PPP, arranged by the SFHA and the Palm Beach County hospitals, is not inherently an anticompetitive practice. No temporary nursing agency was precluded from competing to become a preferred agency. Also, all agencies are still able to provide nurses to medical facilities other than hospitals and even to hospitals should the need for nurses not be met by the preferred agencies. Although the PPP may stabilize prices to some degree, it is not the kind of "stabilization" that can be viewed as price fixing, especially when the escape clauses in the contracts are taken into account. These escape clauses allow the market and not the SFHA to be the ultimate decisionmaker for each hospital and each agency on the issues of price, demand, supply, and terms of dealing.

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[14] The alleged attempt to fix prices by the hospitals' agreement with each other would be horizontal – an agreement among competitors. The alleged attempt to fix prices by the hospitals' agreements with the preferred agencies would be vertical and is not per se illegal after *State Oil Co. v. Kahn*.

2. Group Boycotts

The same principles apply to a consideration of application of the per se rule whether the act complained of is labeled price fixing or a group boycott. "[T]he recent jurisprudence of the Supreme Court and of the Court of Appeals of this Circuit cautions against the haphazard expansion of the 'group boycott label' and the concomitant imposition of per se liability." *Retina Assocs.*, 105 F.3d at 1381. "Not all concerted refusals to deal are predominantly anticompetitive." *Northwest*, 472 U.S. at 298, 105 S.Ct. at 2621. In cases of group boycotts where the per se rule has been applied, "the boycott often cut[s] off access to a supply, facility, or market *necessary to enable the boycotted firm to compete*, . . . and frequently the boycotting firms possessed a *dominant position in the relevant market.*" *Id.* at 294, 105 S.Ct. at 2619 (emphasis added).

In dealing with group boycott situations, market analysis has found its way into the determination of whether a given practice should be per se illegal. No longer is relevant market a factor only after it has been decided that the rule of reason applies. "Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that [the conduct] is virtually always likely to have an anticompetitive effect is not warranted." *Northwest*, 472 U.S. at 296.

In this case, no refusal to deal has been shown. All agencies were able to participate in the bidding to become preferred providers, and generally a hospital will still deal with any nursing agency when the preferred

agencies with which the hospital has contracted for nursing services fail to meet its needs. The record shows, in fact, that more than a trifling portion of hospital nursing business in Palm Beach County continued to go to nonpreferred agencies after the PPP was in operation. Also, due to the rise in HMOs, home care, and similar trends in the medical world, facilities other than hospitals provide the market, the supply, and the facilities necessary for nonpreferred agencies to compete with each other and with preferred agencies in the marketplace.

Per se treatment has been given to those practices which history has shown have only anticompetitive effects. "[A]nalyzing this case under the per se rubric would remain inappropriate absent some demonstration that the practice at issue historically leads to anticompetitive effects in the market." *Retina Assocs.*, 105 F.3d at 1381. No history of this kind seems to exist for health-care preferred-provider programs materially similar to what we have before us now.

We conclude, based upon undisputed facts, that the practice of this PPP is not deserving of per se treatment and was properly evaluated under the rule of reason.

B. Rule of Reason

The rule of reason requires "the factfinder [to weigh] all of the circumstances of the case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). The rule of reason should be applied to practices designed to "increase economic efficiency or render markets more,

rather than less, competitive." *BMI*, 441 U.S. at 19-20; *see also Northwest*, 472 U.S. at 289-90.

"[T]o satisfy the rule of reason, the plaintiff must prove that the [conduct] had an adverse effect on competition." *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1392 (10th Cir. 1992). But, competition occurs only in a market. Thus, "before we can reach the larger question of whether [defendants] violated any of the antitrust laws, we must confront the threshold problem of defining the relevant market." *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991).[15]

Interrogatories went to the jury.[16] The jury found that plaintiffs-appellants failed to establish the relevant market. Because no definable market was proved, plaintiffs could show no adverse effect on competition. Plaintiffs-appellants try to debate the required showing of market power. But their argument is based upon per se treatment of the antitrust claim. Because we have decided, as did the district court, that the PPP triggers no per se analysis, relevant market was critical to plaintiffs-appellants' claims.

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[15] Because this case is subject to the rule of reason and because of the importance of relevant market and market power in evaluating the reasonableness of a purported restraint, the district court's jury instructions and interrogatories directing that the jurors must find for defendants if plaintiffs failed to establish the relevant market were proper applications of the law governing this case.

[16] The interrogatories, among other things, directed the jury to find for the defendants if the plaintiffs did not establish the necessary relevant market.

The jury found that no relevant market was shown; and we will reverse the jury's determination on this factual issue only if it is clearly erroneous. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 381, 76 S.Ct. 994, 999 (1956). We cannot say the finding that no relevant market was established is clearly erroneous. The failure to establish the relevant market (either by product or geography) was fatal to plaintiffs-appellants' antitrust claims. So, we accept the jury verdict against them.

AFFIRMED.

WELLFORD, Senior Circuit Judge, concurring:

I concur in Judge Edmondson's opinion. The antitrust issues were addressed early in this case through a decision on setting aside a preliminary injunction in and expanded on in a concurring opinion authored by then Chief Judge Tjoflat, 887 F.2d 1535, 1539 (11th Cir. 1989) (Tjoflat, C.J., concurring).

There were contested issues as to whether defendants possessed market power in a relevant market for temporary nursing services. The jury decided the contested relevant issue on which plaintiffs had the burden. There were contested issues as to whether defendants had monopoly "control over access to an essential element of competition" by means of the arrangement. Plaintiffs had the burden to prove this and they failed in this burden.

Judge Edmondson points out, as Judge Tjoflat previously did in this case, that *Northwest Wholesale Stationers,*

Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985), is key, and it "prohibits the application of the per se rule to cooperative buying arrangements unless a court has made certain preliminary findings of fact." *Id. Northwest* held that "[a]bsent a showing [of market power or *exclusive access* to an element essential to effective competition] with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis." *Northwest*, 472 U.S. at 297, *quoted in All Care Nursing Service*, 887 F.2d at 1539; *see also* Areeda & Havenkamp, *Antitrust Law* (1989 Supp.) ¶ 1511 (discussing *Northwest* and suggesting that plaintiffs must establish market power of defendant before the court should finally decide *per se* or rule of reason application).

In addition, this circuit has indicated that "[t]he presumption in cases brought under section 1 of the Sherman Act is that the rule-of-reason standard applies." *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1567 (11th Cir. 1991). We observed in that case, moreover, that "[t]he Supreme Court has made it clear that the per se label should be applied infrequently and with caution." *Id.*

The majority opinion has covered all of the questions in this case; I merely emphasize the application of the rule-of-reason principle under the circumstances.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ALL CARE NURSING SERVICE, INC., A COMPLETE HEALTH SERVICE, INC., QUALITY PROFESSIONAL NURSING OF FLORIDA, INC., AND CRITICAL HEALTH CARE, INC.

Plaintiffs,

v.

BETHESDA MEMORIAL HOSPITAL, INC., JUPITER HOSPITAL, INC., NME HOSPITALS, INC. D/B/A DELRAY COMMUNITY HOSPITAL, JOHN F. KENNEDY MEDICAL CENTER, INC., WELLINGTON REGIONAL MEDICAL CENTER, INC., NME HOSPITALS, INC. D/B/A WEST BOCA MEDICAL CENTER, PINECREST REHABILITATION CENTER, BOCA RATON COMMUNITY HOSPITAL, INC., SOUTH FLORIDA HOSPITAL ASSOCIATION, INC., AND HIGH TECH STAFFING SERVICES, INC.,

Defendants.

CASE NO. 88-8568-CIV-PAINE

CASE NO. 88-8572-CIV-PAINE
(Consolidated)

THE PDQ NURSE, INC.

Plaintiff,

v.

SOUTH FLORIDA HOSPITAL ASSOCIATION, INC., BETHESDA MEMORIAL HOSPITAL, INC., JUPITER HOSPITAL, INC., NME HOSPITALS, INC. D/B/A DELRAY COMMUNITY HOSPITAL, JOHN F. KENNEDY MEDICAL CENTER, INC., WELLINGTON REGIONAL MEDICAL CENTER, INC., NME HOSPITALS, INC. D/B/A WEST BOCA MEDICAL CENTER, PINECREST REHABILITATION CENTER,

BOCA RATON COMMUNITY HOSPITAL, INC. AND HIGH TECH STAFFING SERVICES,

Defendants.

SOUTH FLORIDA HOSPITAL ASSOCIATION, INC., BETHESDA MEMORIAL HOSPITAL, INC., JUPITER HOSPITAL, INC., NME HOSPITALS, INC. D/B/A DELRAY COMMUNITY HOSPITAL, JOHN F. KENNEDY MEDICAL CENTER, INC., WELLINGTON REGIONAL MEDICAL CENTER, INC., NME HOSPITALS, INC. D/B/A WEST BOCA MEDICAL CENTER, PINECREST REHABILITATION CENTER, AND BOCA RATON COMMUNITY HOSPITAL, INC.

Counterclaimants,

v.

ALL CARE NURSING SERVICE, INC., A COMPLETE HEALTH SERVICE, INC., QUALITY PROFESSIONAL NURSING OF FLORIDA, INC., THE P.D.Q. NURSE, INC., CRITICAL HEALTH CARE, INC. AND JULIE MONAHAN,

Counter-Defendants.

HIGH TECH STAFFING SERVICES, INC.

Counterclaimant,

v.

ALL CARE NURSING SERVICE, INC., JULIE MONAHAN, THE P.D.Q. NURSE, INC. AND DONNA DAVIS-TAUREL,

Counter-Defendants.

_____/

JUDGMENT IN A CIVIL CASE

(Filed May 3, 1995)

These consolidated actions came before the Court for a jury trial on February 27, 1995 and for concurrent resolution of non-jury claims. On March 27, 1995, the jury rendered its verdict in the form of special interrogatories. On April 14, 1995, this court entered an order in favor of the Counterdefendants on High Tech's Lanham Act claim. In accordance with the jury's verdict and the orders of this court previously entered it is hereby

ORDERED and ADJUDGED that final judgment is entered as follows:

a. In favor of all Defendants and against all Plaintiffs on the Amended Complaint of All Care Nursing Service, Inc., A Complete Health Service, Inc., Quality Professional Nursing of Florida Inc., and Critical Health Care, Inc. and all claims stated therein are dismissed with prejudice;

b. In favor of all Defendants and against all Plaintiffs on the Petition for Injunctive Relief and Amended Complaint for Damages of The P.D.Q. Nurse, Inc. and all claims stated therein are dismissed with prejudice;

c. In favor of Defendants Bethesda Memorial Hospital, Inc., Jupiter Hospital, Inc., NME Hospitals, Inc. d/b/a Delray Community Hospital, John F. Kennedy Medical Center, Inc., Wellington Regional Medical Center, Inc., NME Hospitals, Inc. d/b/a West Boca Medical Center, Pinecrest Rehabilitation Center, Boca Raton Community Hospital, Inc., and South Florida Hospital Association, Inc. and against all Plaintiffs on Count I of the Corrected

Amended Counterclaims for Declaratory Judgment, *to wit*, neither the Preferred Provider Program as implemented by Defendants nor Defendants' participation therein violated state or federal antitrust law (Sections 1 or 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, or Florida Statute §§ 542.18, 542.19);

d. In favor of Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan and against Counterclaimants Bethesda Memorial Hospital, Inc., NME Hospitals, Inc. d/b/a Delray Community Hospital, John F. Kennedy Medical Center, Inc., and Pinecrest Rehabilitation Center on Counts II (Fraud) and III (Civil Theft) of the Corrected Amended Counterclaims, and those claims are dismissed with prejudice;

e. In favor of Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan and against Counterclaimants Bethesda Memorial Hospital, Inc., NME Hospitals, Inc. d/b/a Delray Community Hospital, John F. Kennedy Medical Center, Inc., and Pinecrest Rehabilitation Center on Count IV (Lanham Act) of the Corrected Amended Counterclaims, and those claims are dismissed with prejudice;

f. In favor of Counter-Defendants all Care Nursing Service, Inc. and Julie Monahan and against Counterclaimants South Florida Hospital Association, Inc., Bethesda Memorial Hospital, Inc., NME Hospitals, Inc. d/b/a Delray Community Hospital, John F. Kennedy Medical Center, Inc., Wellington Regional Medical Center, Inc., NME Hospitals, Inc. d/b/a West Boca Community Hospital, Boca Raton Community Hospital, Inc., Jupiter Hospital, Inc. and Pinecrest Rehabilitation Hospital, Inc. on

Count V (Lanham Act) of the Corrected Amended Counterclaims; and those claims are dismissed with prejudice;

e. [sic] In favor of Counterclaimant John F. Kennedy Medical Center, Inc. and against Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan on Count VI (Florida RICO) of the Corrected Amended Counterclaims in the amount of $101,019.45;

f. [sic] In favor of Counterclaimant Pinecrest Rehabilitation Hospital and against Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan on Count VI (Florida RICO) of the Corrected Amended Counterclaims in the amount of $5,193.75;

g. [sic] In favor of Counterclaimant Bethesda Memorial Hospital, Inc. and against Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan on Count VI (Florida RICO) of the Corrected Amended Counterclaims in the amount of $58,728.00;

h. [sic] In favor of Counterclaimant John F. Kennedy Medical Center, Inc. and against Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan on Count VII (Federal RICO) of the Corrected Amended Counterclaims in the amount of $101,019.45;

i. [sic] In favor of Counterclaimant Pinecrest Rehabilitation Hospital and against Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan on Count VII (Federal RICO) of the Corrected Amended Counterclaims in the amount of $5,193.75;

j. [sic] In favor of Counterclaimant Bethesda Memorial Hospital, Inc. and against Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan on Count

VII (Federal RICO) of the Corrected Amended Counterclaims in the amount of $58,728.00;

k. [sic] In favor of Counter-Defendants all Care Nursing Service, Inc. and Julie Monahan and against Counterclaimant High Tech Staffing Service, Inc. on Count I (Attempted Monopolization) of the Amended Answer and Counterclaim of Defendant High Tech Staffing Services, Inc. in both cases, and those claims are dismissed with prejudice;

l. [sic] In favor of Counter-Defendant all Care Nursing Service, Inc. and against Counterclaimant High Tech Staffing Service, Inc. on Counts II (Monopolization) and III (Tortious Interference) of the Amended Answer and Counterclaim of Defendant High Tech Staffing Services, Inc. in both cases, and those claims are dismissed with prejudice;

m. [sic] In favor of Counter-Defendants the P.D.Q. Nurse, Inc. and Donna Davis-Taurel and against Counterclaimant High Tech Staffing Service, Inc. on Count IV (Lanham Act) of the Amended Answer and Counterclaim of Defendant High Tech Staffing Services, Inc. in both cases, and those claims are dismissed with prejudice;

n. [sic] In favor of Counter-Defendants the P.D.Q. Nurse, Inc. and Donna Davis-Taurel and against Counterclaimant High Tech Staffing Service, Inc. on Count V (Civil Theft) of the Amended Answer and Counterclaim of Defendant High Tech Staffing Services, Inc. in both cases, and those claims are dismissed with prejudice;

o. [sic] In favor of Counter-Defendant all Care Nursing Service, Inc. and against Counterclaimant High

Tech Staffing Services, Inc. on Count IV (Lanham Act) of the Amended Answer and that claim is dismissed with prejudice. It is further

ORDERED and ADJUDGED that the prevailing parties shall submit Bills of Costs and Motions for Attorneys' Fees as appropriate, pursuant to Federal Rule of Civil Procedure 54(d)(1), (2)(B), (D) within 60 days of the issuance of a mandate from the Eleventh Circuit Court of Appeals on any appeal which may be taken from this final judgment, or within 60 days of resolution of any post-trial motions, if no notice of appeal from this judgment is filed. Failure to file a Bill of Costs or a Motion for Attorneys' Fees as appropriate prior to any appeal in this matter shall not constitute a waiver of any right thereto previously preserved, notwithstanding the time limits contained in the Local Rules of this Court.

APPROVED AS TO FORM:

/s/ James C. Paine
James C. Paine
United States District Judge

May 2, 1995
DATE

Carlos Juenke
Clerk of the Court

/s/ Svava Ringheim
(By) Svava Ringheim, Deputy Clerk

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NOS. 88-8568-CIV-PAINE
88-8572-CIV-PAINE

ALL CARE NURSING SERVICE, INC., et al.,

Plaintiffs,

vs.

BETHESDA MEMORIAL HOSPITAL, INC., et al.,

Defendants.

_____/

THE P.D.Q. NURSE, INC.,

Plaintiff,

vs.

SOUTH FLORIDA HOSPITAL ASSOCIATION, INC., et al.,

Defendants.

_____/

OMNIBUS ORDER ON POST-TRIAL MOTIONS

This matter is before the Court upon the following post-trial motions:

(1) Plaintiffs' Quality Professional Nursing, Inc., Critical Health Care, Inc., and A Complete Health Service, Inc. Motion for Judgment as a Matter of Law in their favor on the Anti-trust Claims;

(2) Plaintiffs' Quality Professional Nursing, Inc., Critical Health Care, Inc., and A Complete Health Service, Inc. Motion for New Trial;

(3) Plaintiff PDQ Nurse, Inc., Plaintiff/Counterdefendant All Care Nursing Service, Inc., and Defendant Julie Monahan's Renewed Rule 50 Motion for Judgment as a Matter of Law and, alternatively, Rule 59 Motion for New Trial;

(4) Plaintiff All Care Nursing Service, Inc., Julie Monahan and the P.D.Q. Nurse, Inc. Motion to Strike Notice of Appeal filed by Defendant High Tech Staffing Services, Inc.;

Upon review of the motions and memoranda, as well as the responses thereto, and the trial record of this cause, the court enters the following order.

FACTUAL BACKGROUND

On December 27, 1988, the Plaintiffs, All Care Nursing Services, Inc. ("All Care"), A Complete Health Care Services, Inc. ("Complete"), Benson's Health Care Services, Inc. ("Benson"), Critical Health Care, Inc. ("Critical") and Quality Professional Nursing of Florida, Inc. ("Quality") filed a Complaint[1] against thirteen Palm Beach County hospitals[2], eight temporary nursing service

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[1] The Plaintiffs subsequently filed an Amended Complaint on May 9, 1990.

[2] The Defendant hospitals include Delray Community Hospital, Bethesda Memorial Hospital, Inc., Doctors Hospital of Lake Worth, Inc., Good Samaritan Hospital, Inc., JFK Medical

agencies[3], and the South Florida Hospital Association, arising from the Defendants [sic] alleged plan to institute a "preferred provider program" for the provision of temporary nursing services.

On December 28, 1988, Plaintiff P.D.Q. Nurse, Inc. ("PDQ") filed a separate action alleging similar violations by the same Defendants. On February 21, 1989, this court entered an order consolidating the PDQ case with the All Care case.

In the Amended Complaint, the Plaintiffs alleged that in the summer of 1988, the Defendant hospitals met under the auspices of the SFHA and decided to develop a program under which certain of the temporary service agencies would be designated "preferred agencies."[4]

Center, Inc. Palms West Medical Center, Wellington Regional Medical Center, West Boca Medical Center, Boca Raton Community Hospital, Inc., Pine Crest Rehabilitation Hospital, Inc., Psychiatric Institute of America, Inc., and Jupiter Hospital, Inc. On January 17, 1990, the court dismissed Palm Beach Gardens Community Hospital. Further, Psychiatric has been dropped from the action and Doctors, Palms West and Good Samaritan have settled with the Plaintiffs.

[3] These defendant agencies include: High Tech Staffing Services, Inc., Nurses PRN, Inc., Medex of Florida, Inc., Expicare Nursing Agency, Inc., American Health Technologies, Inc., Angels in White, Inc., Olsten of West Palm Beach, and American Medical Staffing, Inc. Medex, Expicare, Olsten and American have settled with the Plaintiffs.

[4] According to the Plaintiffs, the Defendants [sic] actions were motivated by a nationwide shortage of nurses. Plaintiffs state that locally there has been a trend in Palm Beach County for nurses to leave permanent employment positions with hospitals to join temporary nursing agencies. This is because the

Temporary nursing service agencies were contracted directly or by way of notice in the *Palm Beach Post*, and were invited to submit bids for the provision of becoming preferred agencies. Sixteen temporary nursing services submitted bids.[5] Of this number, four agencies were eliminated because of their prices. The remaining agencies were asked to resubmit lower bids. Eight temporary nursing service agencies were selected as preferred agencies.

The Plaintiffs further alleged that, pursuant to the agreement among the hospitals, the preferred agencies and the SFHA hospitals agreed to purchase their agency services only from the preferred agencies at fixed prices and to the exclusion of all other agencies operating in the market unless such agencies were unable to fill a hospital's particular need. To maintain preferred status, these agencies were required to ensure that their nurses were covered by Workmen's Compensation and had to agree to rebate a percentage of their gross yearly income to the SFHA. Additionally, the agencies had to agree not to compete with the hospitals in the hiring of nurses.

Plaintiffs claimed that the purpose of this agreement was to (1) depress the prices for temporary nursing services; (2) stabilize the pricing of all nursing services; (3) set maximum prices for agency services and (4) eliminate temporary agencies from the market. Accordingly, the Plaintiffs alleged that the Defendants' action were an

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temporary agencies offer them higher wages as well as the freedom to work where and when they wish.

[5] The Defendants assert as an affirmative defense that Quality and All Care participated in the "preferred provider" program by "submitting bids and otherwise."

unlawful conspiracy in restraint of trade in commerce in violation of the Sherman Anti-Trust Act, 15 U.S.C. § 1 and Florida Statute § 542.18. The hospitals counterclaimed against All Care and sued Defendant Monahan for, *inter alia*, violations of Florida and federal RICO.

After a one month trial during which some of the claims were dismissed, the jury rendered a verdict in favor of the Defendant hospitals on the anti-trust claims. The jury also rendered a verdict in favor of the hospitals and against All Care and Monahan on the RICO claims. In accordance with the jury verdict and all pre-trial and trial rulings on each claim, this court entered final judgment. The final judgment precipitated the timely-filed post-trial motions which the court now addresses.

I. Quality Professional Nursing, Inc., Critical Health Care, Inc., and A Complete Health Service, Inc.'s Motion for Judgment as a Matter of Law

The Plaintiffs Quality Professional Nursing, Inc., Critical Health Care, Inc., and A Complete Health Service, Inc. have filed a Motion for Judgment as a Matter of Law in their favor on the Anti-trust Claims. In this motion, these Plaintiffs again ask this court to hold that the preferred provider program constituted a *per se* illegal horizontal price fixing agreement and a *per se* illegal group boycott.

Standard Governing Motion for Judgment As a Matter of Law

Federal Rule of Civil Procedure 50(a) states in pertinent part:

> "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue."

In considering such motions, the trial judge does not exercise discretion or credibility determinations, but, rather, he makes a ruling of law. *Miles v. Tennessee River Pulp and Paper Co.*, 862 F.2d 1525, 1528 (11th Cir. 1989). In *Miles*, the Eleventh Circuit set forth the appropriate standard for the district court to employ upon consideration of such a motion:

> The court should consider all of the evidence – not just that evidence which supports the non-mover's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the verdict is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.

Id. at 1528.

Application of the Per Se Rule to the Boycott Claim

In his concurring opinion in *All Care Nursing Service v. Bethesda Memorial*, 887 F.2d 1535, 1539 (11th Cir. 1989), Chief Judge Tjoflat offered guidance to this court on when a court may apply the *per se* rule to the boycott and price-fixing claims as presented in this case.[6] Holding that this court previously held the mistaken belief that the per se rule would automatically apply to this case, Judge Tjoflat itemized the findings of fact that the court must enter before it may apply the per se rule to a case such as this. *Id.* Regarding the boycott claim, Judge Tjoflat held that the Supreme Court's opinion in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* , 105 S.Ct. 2613 (1985), prohibits the application of the per se rule to cooperative buying arrangements unless a court has made certain preliminary findings of

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[6] The Plaintiff contends that since Judge Tjoflat's concurrence in this case, the United States Supreme Court has issued two opinions which overrule Judge Tjoflat's concurring opinion. In the first, *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (1990), the FTC sued a group of lawyers in private practice who regularly acted as court-appointed counsel for indigent defendants who agreed to stop providing such representation until the District of Columbia increased group members compensation. The FTC was able to establish that the Defendants who were competitors, engaged in a horizontal arrangement to fix prices and had achieved their economic goal, which produced a crisis in the government's administration of criminal justice in that District. The record in the present case is distinguishable from the facts of the *Trial Lawyer's* case and, in the opinion of this court, the Supreme Court's ruling therein does not alter Judge Tjoflat's holding in *All Care*. Likewise, the second case, *Palmer v. BRG of Georgia*, 111 S. Ct. 401 (1990), does not require a different result.

fact. *All Care*, 887 F.2d at 1539. In *Northwest*, the Court held that "[a]bsent . . . a showing [of market power or exclusive access to an element essential to effective competition] with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis." 105 S.Ct. at 2621. Therefore, Judge Tjoflat held that this court must make findings of fact with regard to the Defendants' market power and control over access to an essential element of competition. Judge Tjoflat specifically held that:

> If, for example, the district court finds that the SFHA is merely an association of small hospitals that, as a combined force, accounts for only a small share of the relevant market for temporary nursing services, then the court should hold that the SFHA does not possess market power. Likewise, if the court finds that members of the SFHA could contract independently with temporary nursing agencies, then the court might also find that the SFHA does not have control over access to an essential element of competition . . . If the court finds either that the SFHA had market power or that it had control over access to an essential element of competition, then the court should apply the per se rule of liability. Otherwise, the court should examine the buying arrangement under a rule of reason analysis.

All Care, 887 F.2d at 1540 (footnote, citations omitted).

In the present case, regarding the first element identified by Judge Tjoflat, *to wit*, market power, this court cannot make a determination that the Defendants possessed market power because the Plaintiffs have failed to

establish a relevant geographic market. The relevant geographic market is defined as the area of effective competition, the area in which the *seller* operates and to which the purchaser can practicably turn for supplies. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 321 (1961). Dr. Pisarkiewicz, Plaintiffs' expert, defined the relevant market in the present case as "the provision of temporary nursing services to hospitals by temporary nursing agencies in Palm Beach County." On cross examination of the Plaintiff's expert, the Defendants created a factual issue regarding the fact that this definition ignores actual and potential competition exerted by users of nursing services other than hospitals. The Defendants also produced evidence that established that some of the hospitals in Southern Palm Beach County are geographically located closer to hospitals in Broward County than they are to hospitals in Northern Palm Beach County. Plaintiff's market power theory depended upon the accuracy of Dr. Pisarkiewicz' relevant market definition. The Defendants successfully raised factual issues at trial with respect to the appropriate relevant market definition. Accordingly, this court cannot take the antitrust claim from the jury because there remained a jury question of fact regarding the SFHA's market power. Specifically, there remained a jury question with respect to the relevant market in which to measure the Defendants' market power.

Regarding the second element identified by Judge Tjoflat, *to wit*, whether the Defendants possessed exclusive access to an element essential to effective competition, it cannot be said on the present record that the Plaintiff has established that members of the SFHA could

not contract independently with temporary nursing agencies. The court cannot now hold as a matter of law that the facts adduced at trial establish that Defendants had control over access to an essential element of competition. Accordingly, the Plaintiffs cannot establish the second requisite element in order to qualify for application of the *per se* analysis to its antitrust claims.

Absent a showing of market power or exclusive access to an element essential to effective competition, the court must apply a rule of reason analysis. Accordingly, having failed to establish as a matter of undisputed fact that the Defendants either had market power or had control over an element essential to competition, the Plaintiffs cannot prevail on their motion for judgment as a matter of law with respect to the *per se* analysis of their boycott claim.

Application of the Per Se Rule to the Price-Fixing Claim

Judge Tjoflat correctly noted in his concurring opinion that the Supreme Court has never wavered from its application of the per se rule to price-fixing claims. *All Care* 887 F.2d at 1540 (citations omitted). However, upon review of the same record presently before this court, Judge Tjoflat noted that the Defendants had created a genuine issue of material fact regarding whether the Defendants ever entered into an agreement to fix prices. At trial the Defendants established, as they had previously alleged, that no maximum or uniform price was set for accepting bids. In fact, they also established that all of the bids ultimately accepted were *above* the price range suggested by the Defendants and more than the amount

paid for the services prior to the bid request. Judge Tjoflat held that not all joint purchasing agreements have a stabilizing effect on prices and result in antitrust liability. *Id.* He specifically stated:

> If the purchasing agent does not have market power or does not have control over access to an essential element of competition, then the agent will still have to bid against other purchasers for the scarce resources. Consequently, the [Plaintiffs'] price-fixing claim will stand or fall on the same findings of fact required to support their boycott claim: (1) did the SFHA have market power, and (2) did the SFHA control access to an essential element of competition?

Id. at 1540 (citations omitted).

Therefore, for the above-stated reasons and because the court cannot determine market power without defining the relevant market, Plaintiffs' Motion for Judgment as a Matter of Law must be denied.

Was the Preferred Provider Program an Unreasonable Restraint of Trade?

These Plaintiffs also urge the court to grant judgment as a matter of law on the ground that the Preferred Provider Program, as implemented, constituted an unreasonable restraint of trade.

In an attempt to protect interstate trade and commerce against unlawful restraints, Congress has declared that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, is illegal. 15 U.S.C. § 1.

In order to establish that judgment should be entered in their favor as a matter of law pursuant to § 1 of the Sherman Act, these Plaintiffs must establish (1) a contract, combination or conspiracy of two distinct persons, (2) resulting in an unreasonable restraint of interstate trade or commerce, and (3) actual damage caused by an anti-competitive restraint of trade. *GTE Data Services, Inc. v. Electronic Data Systems Corp.*, 717 F.Supp. 1487, 1495 (M.D. Fla. 1989). Regarding the first element, it is now well settled that a unilateral refusal to deal does not demonstrate a conspiracy. *The Aquachem Co., Inc. v. Olin Corp.*, 699 F.2d 516 (11th Cir. 1983). Regarding the second element, it must be noted that the statute is designed to protect *competition*, not competitors. *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied* 450 U.S. 1030 (1981).[7] Therefore, unfair competition does not become a Sherman Act violation unless there is (1) a market effect which would be prohibited under the law of mergers, and (2) other conduct that threatens Sherman Act values, such as elimination of competitors or increased prices. *Id.* Because market share is the principal judicial device for measuring actual or potential market power, the threshold inquiry is identifying the appropriate market. *United States v. Anchor* at 994. The definition of the relevant market is essentially a factual question and the appropriate measure of a firm's share is the quantity of goods or services actually sold to consumers. *Id.* at 994. In the present case, the court finds that

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[7] The Eleventh Circuit, in the *en banc* decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

the Plaintiffs have failed to establish a relevant geographic market. Accordingly, it is impossible for this court to hold as a matter of law that the Preferred Provider Program, as implemented, constituted an unreasonable restraint of trade. Therefore, Plaintiffs' motion for judgment as a matter of law on these grounds must be denied.

Finally, this court is not inclined to grant Plaintiffs' motion for judgment as a matter of law regarding High Tech Staffing's participation in the antitrust violations or the *in pari delicto* defense. The court finds that questions of fact preclude the entry of judgment as a matter of law on these issues of whether High Tech was a member of an antitrust conspiracy or whether these Plaintiffs themselves participated in the challenged program. Additionally, the court finds that entry of judgment on either of these claims, even if appropriate under the record, would be meaningless in light of the jury's verdict for the Defendant on the relevant geographic market.

II. Plaintiffs' Quality Professional Nursing, Inc., Critical Health Care, Inc., and A Complete Health Service. Inc. Motion for New Trial

In order to grant a motion for new trial, this court in its discretion must find that the jury verdict was contrary to the great weight of the evidence. *Richards v. Michelin Tire Corp.*, 21 F.3d 1048 (11th Cir. 1994).

These Plaintiffs challenge the verdict form which required the jury to render a threshold, dispositive interrogatory verdict on relevant geographic market. The verdict form is consistent with this court's ruling, both at the

summary judgment stage and at the motion for judgment as a matter of law stage. As set forth in detail above, absent proof of market power, the cooperative buying agreement qualifies for rule-of reason [sic] treatment. Therefore, absent proof of a relevant geographic market, the jury verdict was properly rendered in favor of the Defendants. The remaining arguments regarding jury instructions are equally without merit, and, in light of the jury's verdict on the relevant market definition, would constitute harmless error, if any exists at all.

Plaintiffs also seek a new trial on the grounds that this court improperly denied its [sic] request, at the close of evidence, to amend the pleadings to conform to the evidence. These Plaintiffs sought to amend the pleadings to include claims (1) that the Defendants, through the Preferred Provider Program, as implemented, tortiously interfered in the relations between Plaintiffs and the nurses, and (2) against High Tech Staffing Service, Inc. for participation in a *per se* unlawful group boycott.

Regarding the former claim, the court denied Plaintiffs [sic] Motion to Amend to Conform to the Evidence because the evidence did not support Plaintiff's newly raised tortious interference claim. In order to overcome the competitor's privilege in a tortious interference action in Florida, Plaintiffs would bear the burden of proving that Defendant's [sic] interfered by means of "physical violence, misrepresentation, illegal conduct or threat of illegal conduct, and the like." *Fl. Standard Jury Instructions in Civil Cases*, MI 7.2 at 2 (1985). In the present case, the tortious interference claim was to be premised upon Defendant's alleged illegal antitrust conduct. In light of the jury's verdict in favor of the Defendants on this claim,

and this court's finding that Plaintiff did not produce additional evidence to support the claim, Plaintiff's motion for new trial based upon failure of this court to grant leave to amend, must be denied.

Regarding the latter claim, the court finds that, because the *per se* unlawful group claim was rejected, the failure of this court to permit amendment to include High Tech in it, was not error warranting a new trial.

Finally, Plaintiffs complain of Defense counsel's comments during closing argument. The Plaintiffs argue that, in explaining Defendants [sic] motives and cost-consciousness, the Defendants impermissibly invoked the "golden rule," thereby inflaming the jury. A review of the transcript reveals that Defense counsel made no suggestion that the jury had a stake in the outcome of the case, but instead explained the effect on consumers of the conduct at issue. If Plaintiffs desired some sort of clarifying curative instruction, they could have requested one at the time of closing argument. However, the Plaintiffs neither contemporaneously objected nor sought a curative instruction to clarify counsel's comments. The court finds that the challenged comments were neither inflammatory nor violative of the golden rule. Accordingly, Plaintiffs [sic] Motion for New Trial must be denied on these grounds.

III. Plaintiff PDQ Nurse, Inc., Plaintiff/Counterdefendant All Care Nursing Service, Inc., and Defendant Julie Monahan's Renewed Rule 50 Motion for Judgment as a Matter of Law and, alternatively, Rule 59 Motion for New Trial

To the extent that these Plaintiffs adopt the motion of their co-plaintiffs with respect to judgment as a matter of law as to the antitrust claims, for the reasons set forth above, this motion must be denied with respect to the antitrust claims.

Plaintiffs AllCare and Monahan also seek judgment as a matter of law on the counterclaims and the third party claims against Monahan, *to wit*, Florida and Federal RICO. This court has on several occasions in the past rejected AllCare and Monahan's contention that the Joint Commission on Accreditation of Health Care Organizations, which provides that Defendant hospitals are responsible for checking the credentials of all personnel working at the hospital, somehow excuses their unrelated conduct of having misrepresented the credentials of temporary personnel services purchased from them by the hospitals. While such an argument is, of course, relevant to the issue of a hospital's liability to an injured victim of medical malpractice, it has absolutely no relevance in a RICO action in which the hospitals charge that AllCare and Monahan misrepresented the credentials of its personnel, for whom the hospitals were fraudulently overcharged. The hospitals are not seeking to avoid liability for the malpractice of the overcharged, under-credentialed personnel fraudulently provided by AllCare at Monahan's direction. Plaintiff's argument that the hospitals alleged non-compliance with the standard "can cause

irreparable harm or death to patients" simply has no bearing on the RICO verdicts against AllCare and Monahan. To suggest that a temporary nursing service can avoid liability for fraud against a hospital because a standard designed to protect patients requires the hospital to check the credentials of health care workers, is illogical. Additionally, even if the Standards had any bearing on the RICO claims, Plaintiffs continuously and without explanation, fail to cite the provision of those standards which clearly permits a hospital to do exactly what the defendants did in this case, i.e. to *rely* on the outside evaluation of the nurses credentials. The facts in this record support a finding that the hospitals were lied to about the credentials of some nurses provided to them by AllCare and Monahan. Nothing in the above-cited standards insulates AllCare or Monahan from liability for their fraud upon the hospitals.

Regarding AllCare and Monahan's challenge to the Defendants' reliance on the misstatements for the purpose of establishing damages[8], this record is replete with abundant proof that the Defendant/CounterPlaintiff hospitals relied in fact upon AllCare and Monahan's deception. First, it is undisputed on this record that the hospitals relied upon the representation that nursing personnel were credentialed when they put them on duty in the capacity which their falsely represented credentials

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[8] As this court ruled at the charge conference, reliance is not an element of a RICO claim, except to the extent that a RICO Plaintiff must prove that he was injured by reason of the Defendant's acts of deception. *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991).

justified. Second, it is also undisputed that, upon completion of the shift and upon receipt of a bill from AllCare, which charged at the higher credentialed rate, the hospitals remitted payment as charged, unaware that the nurse was not credentialed as represented by AllCare and Monahan. All Care's argument that the invoices which were sent through the mail were not false is simply belied by the undisputed evidence in this record. There is ample, unrefuted evidence in this record to support the jury's verdict that the mailed invoices were false. Simply stated, AllCare and Monahan charged the hospital for services which were not rendered. The jury verdict against AllCare and Monahan on the RICO claims is amply supported by the evidence and will not be disturbed.

AllCare and Monahan now challenge the court's RICO instruction which includes coverage of the mail-fraud offense. It is noteworthy that the instruction given is the Fifth Circuit Pattern Instruction on RICO and that prior to trial, AllCare and Monahan stipulated to the instruction. Thereafter, in accordance with the stipulation, the hospitals presented proof as required by the agreed upon pattern instruction. Accordingly, this court finds that in the interest of justice and fairness, AllCare and Monahan waived any objection to the stipulated instruction as given. However, even if the court were inclined to consider the belated objection, the court finds that the Fifth Circuit Pattern Instruction as given was adequate under Eleventh Circuit authority and that no additional reliance, beyond proof of injury was required. *Pelletier* requires only that the RICO Plaintiff establish

that he was injured by reason of the Defendant's deception. The RICO charge given was correct and Counterdefendant AllCare and Defendant Monahan's motion charging error therein must be denied.

Likewise, the jury's failure to fill in the "hospital bill" and "bill date" on the interrogatory verdict form does not warrant a new trial. These lines were "worksheet" lines and the verdict as presented is not vague because it is readily apparent from the amount of the verdict that the jury adopted *in toto* the hospitals' claimed damages. Further, AllCare could have objected to this failure at the time the jury verdict was rendered. At that time, prior to discharge of the jury, Mr. Scarola asked to personally review the verdict and he was given an opportunity to do so. If Mr. Scarola thought that the verdict was ambiguous or incomplete, he should have objected at that time, thereby enabling the court to send the jury back to fill in the worksheet lines. Having failed to contemporaneousy [sic] object prior to discharge of the jury, AllCare waived any possible objection to this alleged error in the verdict form. *See, Austin-Westshore Connst.* [sic] *v. Federated Dept. Stores,* 934 F.2d 1217, 1226 (11th Cir. 1991) (When a jury interrogatory contains alleged ambiguities or inconsistencies, a party must object before the jury is excused, or the objection is waived).

Finally, the Plaintiffs contend that the economic loss rule required dismissal of the RICO claims. While this court dismissed the pendent tort claims because the economic-loss rule barred same, this court has already determined that the economic loss rule does not bar the RICO claims against AllCare and Monahan. The Eleventh Circuit has already rejected a RICO defendant's argument

that Florida's economic loss rule barred an award of treble damages for RICO violations where "the same conduct forms a basis for a breach of contract claim." *Arabian American Oil Co. v. Scarfone*, 939 F. 2d 1472, 1478 (11th Cir. 1991). In fact, as noted by the Eleventh Circuit in *Scarfone*, many RICO cases involve contract disputes. *Id.*

In view of all of the foregoing, the Motion for Judgment as a Matter of Law or in the Alternative for New Trial must be denied.

IV. Plaintiff All Care Nursing Service, Inc., Julie Monahan and the P.D.Q. Nurse, Inc. Motion to Strike Notice of Appeal filed by Defendant High Tech Staffing Services, Inc.

Plaintiffs AllCare, Julie Monahan and the P.D.Q. Nurse, move to strike High Tech's Notice of Appeal on the sole ground that the notice was signed by Thomas J. Larkin, Esq. This court previously required that High Tech be represented by counsel other than Larkin at trial because Larkin was to be a material witness at trial. Mr. Larkin is an attorney duly admitted to practice in this court. With the permission of this court, he handled all pre-trial litigation. The court finds that Rule 4.3-7 does not prevent Mr. Larkin from representing High Tech in the appeal if he desires to do so. Accordingly, the motion to strike on this ground must be denied.

However, because the notice of appeal was filed prior to the expiration of time for the filing of post-trial motions, the notice was premature. High Tech has no objection to the striking of the notice as premature.

Accordingly, the notice of appeal will be stricken and the time for filing such notice will not begin to run until this order is entered by the clerk of the court.

In view of all of the foregoing, it is

ORDERED and ADJUDGED that

(1) Plaintiffs' Quality Professional Nursing, Inc., Critical Health Care, Inc., and A Complete Health Service, Inc. Motion for Judgment as a Matter of Law in their favor on the Anti-trust Claims is DENIED;

(2) Plaintiffs' Quality Professional Nursing, Inc., Critical Health Care, Inc., and A Complete Health Service, Inc. Motion for New Trial is DENIED;

(3) Plaintiff PDQ Nurse, Inc., Plaintiff/Counterdefendant All Care Nursing Service, Inc., and Defendant Julie Monahan's Renewed Rule 50 Motion for Judgment as a Matter of Law and, alternatively, Rule 59 Motion for New Trial is DENIED;

(4) Plaintiff All Care Nursing Service, Inc., Julie Monahan and the P.D.Q. Nurse, Inc. Motion to Strike Notice of Appeal filed by Defendant High Tech Staffing Services, Inc. is DENIED; the court *sua sponte* strikes the notice of appeal as being untimely.

Finally, it is

ORDERED and ADJUDGED that there are presently no pending motions in this case and that the clerk of the court shall close this case and declare each and every pending motion to be resolved.

DONE and ORDERED in West Palm Beach, Florida, this 25th day of August, 1995.

/s/ James C. Paine
UNITED STATES DISTRICT JUDGE

Copies furnished to:

counsel of record:
Jack Scarola, Esq.
Blaine H. Winship, Esq.
Michael J. McHale, Esq.
Philip A. Allen, III, Esq.
Richard A. Feinstein, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4714

D.C. Docket No. 88-8568-CIV-JCP

ALL CARE NURSING SERVICE, INC.,
BENSON HEALTH CARE SERVICES, INC.,
A COMPLETE HEALTH SERVICE, INC.,
QUALITY PROFESSIONAL NURSING,
INC., CRITICAL HEALTH CARE,
INC., ET AL.,

Plaintiffs-Appellees,

versus

BETHESDA MEMORIAL HOSPITAL, INC.,
INC. [sic] NME HOSPITALS, DOCTORS
HOSPITAL OF LAKE WORTH, INC.,
GOOD SAMARITAN HOSPITAL, INC.,
JFK MEDICAL CENTER, INC., ET AL.,

Defendants,

HIGH TECH STAFFING SERVICES, INC.,

Defendant-Appellant.

95-5218

D.C. Docket No. 88-8568-CIV-JCP

ALL CARE NURSING SERVICE, INC.,

Plaintiff-Appellant,

BENSON HEALTH CARE SERVICES, INC.,

Plaintiff,

A COMPLETE HEALTH SERVICE, INC.,
QUALITY PROFESSIONAL NURSING, INC.,
CRITICAL HEALTH CARE, INC.,
PDQ NURSE, INC.,

Plaintiffs-Appellants,

JULIE MONAHAN,

Counter-Defendant-
Appellant,

versus

BETHESDA MEMORIAL HOSPITAL, INC.,
INC. [sic] NME HOSPITALS, DOCTORS
HOSPITAL OF LAKE WORTH, INC.,
GOOD SAMARITAN HOSPITAL, INC.,
JFK MEDICAL CENTER, INC.,
ET AL.,

Defendants-Appellees,

HIGH TECH STAFFING SERVICES, INC.,

Defendant-Appellant-
Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(Filed May 18, 1998)

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 1998, ___ F.2d ___).

Before EDMONDSON and BARKETT, Circuit Judges, and WELLFORD*, Senior Circuit Judges [sic].

BY THE COURT:

The Petition(s) for Rehearing on the antitrust issues in this case are DENIED, and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

Appellants, All Care Nursing Service, Inc., Julie Monahan, and The PDQ Nurse, Inc., filed a separate Petition for Rehearing on the issue of the applicability of the economic loss rule to civil Florida RICO claims. About this issue, the relevant Appellees are directed to file a reply to this petition. The reply shall be no longer than 12 pages, spaced according to the rules of this circuit, and should be filed within 21 days from the date of this order.

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* Honorable Harry W. Wellford, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4714 & 95-5218

ALL CARE NURSING SERVICE, INC., et al.

Plaintiffs-Appellants,

versus

BETHESDA MEMORIAL HOSPITAL, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Sep. 18, 1998)

BEFORE: EDMONDSON and BARKETT, Circuit Judges, and WELLFORD*, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellants, all Care Nursing Service, Inc., Julie Monahan, and the PDQ Nurse, Inc. Is [sic] denied.

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* Honorable Harry W. Wellford, Senior U.S. Circuit Judge Sixth Circuit, sitting by designation.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE